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## SANCTIONS IN ANTITRUST CASES

-- Background Paper by the Secretariat\* --

### Abstract

Competition authorities have imposed substantial fines for competition law violations over the last few decades. Several common steps are observed in setting fines: (i) determination of basic fine; (ii) adjustments (including aggravating and mitigating circumstances); (iii) comparisons to limits; and (iv) considerations related to leniency programmes. A majority of competition authorities refer to the relevant turnover as the basis for the calculation of the fine while other authorities calculate basic fine to be imposed with reference to the global turnover. In determining the amount of fines, most competition authorities take into account aggravating circumstances or mitigating circumstances, including: recidivism; the role of the undertaking in the infringement; co-operation with the investigating authorities; and existence of a compliance programme. A number of jurisdictions institute a maximum fining cap for undertakings due to proportionality and bankruptcy. There are several challenges competition authorities often confront, including how to consider parental liabilities.

Competition authorities often consider that fines on corporations may be insufficient alone to deter infringements and therefore impose other forms of sanctions. These may take different forms, such as- criminal sanctions, disqualification orders on directors of undertakings, publication of findings of infringements and bans on bidding for public contracts. Some jurisdictions advocate criminal sanctions, especially imprisonment as the most effective sanction. However, in many jurisdictions, criminal sanctions on individuals are imposed rarely due to several reasons including consistency with social norms. Director disqualification provides a sanction against individuals but avoids the complexity and uncertainty of a criminal process. Nonetheless, disqualification has several drawbacks, including that the deterrent effect is likely to depend on how close the director is to retirement. Debarment from future bidding opportunities, especially in public procurement, may be an effective form of sanction due to the impact on the turnover of companies. On the other hand, concerns have been raised such as how debarment harmonises with a leniency programme.

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## 1. Introduction

1. Competition law offenders are often subject to fines (civil, administrative or criminal).<sup>1</sup> Fines impose a cost on those companies or individuals undertaking illegal anticompetitive conduct. Fines play a role in deterrence by making unlawful conduct less profitable. Breaking competition laws is profitable if it goes undetected. From the perspective of a pure profit-maximising company, it will not violate the law if the expected monetary sanctions are greater than the expected illegal gain. However, competition authorities often consider that fines on corporations may be insufficient alone to deter infringements and therefore impose other forms of sanctions. These may take different forms, such as- criminal sanctions, disqualification orders on directors of undertakings, publication of findings of infringements and bans on bidding for public contracts. Nonetheless, some observers raise questions about the effectiveness of these other sanctions. As a result, there is indeed an increasing need to review antitrust sanctions adopted by different jurisdictions in order to consider the deterrent power of current penalties regimes.

2. This paper is organised as follows. The first part will review how the basic amount of a fine is calculated, usually related to a percentage of the turnover, value of sales or volume of affected commerce. The second part analyses how the basic fine adjustments due to aggravating and mitigating circumstances vary or converge across jurisdictions. Then the paper will review several challenges competition authorities often face when levying fines based on the fine-setting process in practice. Finally, the last part of the paper considers the various types of sanctions and examines the pros and cons of the sanctions.

3. The main findings from this paper can be summed up as follows:

- Most competition authorities pursue one or more objectives with their fining policy: deterrence, punishment, disgorgement or compensation. The method for setting fines may differ depending upon the objectives the authorities prioritise.
- Many competition authorities adopt several steps in setting of fines: (i) determination of basic fine; (ii) adjustments (including aggravating and mitigating circumstances); (iii) comparisons to limits; and (iv) considerations related to leniency programmes.
- A majority of competition authorities refer to the relevant turnover as the basis for the calculation of the fine because they consider this concept as a proxy for the illegal gain while other authorities calculate basic fine to be imposed with reference to the firm's global turnover.
- In determining the amount of fines, most competition authorities take into account aggravating circumstances or mitigating circumstances. Common circumstances include: recidivism; the role of the undertaking in the infringement; co-operation with the investigating authorities; and existence of a compliance programme. While increased fines for recidivists are generally considered necessary, the scope of recidivism can be challenging to define. At times, there can be unintended effects from considering the role of the undertaking in the infringement as an aggravating circumstance. Some jurisdictions grant a reduction in fines when the violating firm has a compliance programme, while others do not consider the programme as a mitigating factor.
- A number of jurisdictions institute a maximum fining cap for undertakings due to proportionality and bankruptcy. Most take the form of a percentage of the world wide turnover while others use a percentage of relevant turnover. In some jurisdictions, a percentage of the world-wide turnover is not a cap but the maximum fine.

- Competition authorities often confront several challenges, including: (i) how to consider parental liabilities; (ii) how to calculate fines involving vertically-integrated undertakings and foreign sales; (iii) the suspensory effect of judicial scrutiny; (iv) the actual collection of fines; and (v) the imposition of fines on trade association.
- A number of competition authorities impose other forms of sanctions in addition to corporate fines: (i) criminal sanctions; (ii) director disqualification; (iii) publication of findings of infringements; and (iv) debarment against bid rigging. These other sanctions may play an important dissuasive role against illegal actions.
  - Some jurisdictions advocate criminal sanctions, especially imprisonment as the most effective sanction because it can align individuals' incentives in a manner that corporate fines cannot. However, in many jurisdictions, criminal sanctions on individuals are imposed rarely. Reasons include: (i) a country might consider that criminal sanctions are not compatible with its values and social norms; (ii) the difficulty of obtaining sufficient evidence to bring a successful criminal prosecution given the higher standard of proof required in criminal cases; and (iii) the costs of criminal sanctions, in particular imprisonment, could be high not only in terms of the inability of the individuals imprisoned to contribute to the society and economy but also in terms of convicting innocent individuals (i.e., false positives).
  - Director disqualification provides a sanction against individuals but avoids the complexity and uncertainty of a criminal process. Nonetheless, disqualification is not immune from criticism: (i) the deterrent effect is likely to depend on how close the director is to retirement; (ii) a company could employ the director in another capacity; and (iii) disqualification can only be used against directors, not against employees who have been directly involved in cartel conduct.
  - Debarment from future bidding opportunities, especially in public procurement, may be an effective form of sanction due to the impact on the turnover of companies. On the other hand, debarment raises questions such as: (i) how does a leniency programme work with debarment; (ii) does debarment raise risks for bid rigging in markets with few potential suppliers; and (iii) what is the duration of debarment and to which market does it apply?

## **2. Anticompetitive conduct subject to fines and addressees of fines**

### **2.1 *Imposing fines on abuse of market dominance and cartels***

4. Competition laws prohibit cartels and abuse of market dominance<sup>2</sup> and competition authorities usually impose fines against the violating undertakings. However, in at least one major jurisdiction, fines are primarily or exclusively applied to address cartels.<sup>3</sup>

5. In the past, cases of abuse of dominance in young jurisdictions were relatively rare. However, this is no longer the case. As table 1 shows, young authorities have been very active with enforcing the law against abuse of dominance. The majority of cases in young jurisdictions are mainly related to infrastructure markets such as telecommunications, steel and oil refining where former or current state owned companies often hold a dominant position. Young competition authorities seem to make vigorous efforts to promote competition in newly liberalised markets by facilitating market entry. Considering the size of companies in those fields, usually former monopolists, together with the gravity of the conduct, fines levied are often very high. However, compared to cartel cases, young authorities still face challenges because of the heavy burden of proof required in abuse of dominance cases.<sup>4</sup>

Table 1. Cases of abuse of market dominance in selected jurisdictions

Country	A most recent high-profile case (initial fine level, potentially subject to appeal) / Sector affected
Belgium	<i>Proximus</i> (2009), EUR 66.3 m (USD 92.6 m) /mobile communications
Brazil	<i>AmBev</i> case (2009), BRL 352 m (approx. USD 160 m) / beer
Canada	<i>Reliance</i> case (2015), CAD 5 m (approx. USD 3.8 m) /supply of natural gas water heaters
Chile	<i>MVO</i> case (2010), USD 8.1 m / mobile communications
China (People's Republic of)	<i>Qualcomm</i> case (2015), CNY 6.08 b (USD 975 m) / telecommunication equipment
Colombia	<i>Claro</i> case (2013), COP 88 b (USD 45.2 m) / telecommunications
Ecuador <sup>5</sup>	<i>Claro</i> case (2014), USD 138 m / telecommunications / telecommunications
EU	<i>Intel</i> case (2009), EUR 1.06 b (approx. USD 1.45 b) / semiconductor chip
Hungary	<i>Auchan</i> case (2015), HUF 1.1 billion (USD 3.85 m) / retailer
Finland	<i>Valio Oy</i> (2012), EUR 70 m (approx. USD 7.7 m) / production and wholesale of fresh milk
France	<i>Orange</i> case (2015), EUR 350 m (USD 380 m) / mobile communications
Germany	<i>RTL and Pro7/Sat1</i> case (2007), EUR 216 m (approx. USD 237.6. m) / private television companies
India	<i>Honda Siel Cars</i> case (2014), INR 25.4 b (approx. USD 420 m) / car manufacture
Indonesia	<i>BRI</i> case (2015), IDR 57 b (USD 4 397 983) / bank
Italy <sup>6</sup>	<i>Telecom Italia</i> case (2013), EUR 103.8 m (approx. USD 114 m) / telecommunications
Japan	-
Korea	<i>Qualcomm</i> case (2009), KRW 273.2 b (USD 227.6 m) / telecommunication equipment
Malaysia	<i>My EG Services Bhd</i> case <sup>7</sup> (2015), RM 307 200 (approx. USD 76 800) / e-commerce
Norway	-
Singapore	<i>STSI</i> case (2010), SGD 989 000 (approx. USD 73 180) / online ticketing service
Slovenia	<i>Pro Plus</i> case (2013), EUR 4 994 491 (approx. USD 5 483 940 ) / multimedia
Switzerland	<i>Swisscom</i> case (2009), CHF 219 m (USD 216 m) / telecommunications
Portugal	<i>Associação Nacional das Farmácias</i> case (2015), EUR 10.34 m (approx. USD 11.58 m) / pharmacies' data
Romania	<i>Orange and Vodafone</i> case (2011), EUR 63.1 m (approx. USD 69.4 m) /mobile communications
Russia	<i>Lukoil</i> case (2009), USD 500 m <sup>8</sup> / oil production
South Africa	<i>Mittal Steel</i> case (2007), ZAR 691.8 m (USD 100 m) / flat steel
Spain	<i>Telefonica, Vodafone and Orange</i> case (2012), EUR 119.9 m (USD 159 m) / mobile communications
Turkey	<i>Tupras</i> case (2014), 412 m TRY (USD 185 m) / petroleum refineries
The UK	<i>Reckitt Benckiser</i> case (2011), GBP 10.2 m (approx. USD 13.5 m ) / consumer goods
Ukraine	<i>State Concern Ukrspirt</i> case (2012), approx. USD 25 m / ethyl alcohol
The US	-

6. Although competition authorities impose fines against abuse of market dominance, most fines are against cartel participants. Recently, young authorities have made rapid progress in imposing fines against cartels. Moreover, they have enforced their competition laws not only on purely domestic cartels but also international cartels, following the pattern of older authorities.<sup>9</sup> Detecting and fining international cartels requires effective anti-cartel enforcement because of the high fines and the companies' appealing of authority decisions to courts. As for calculating the amount of fines, young authorities introduced or considering introducing fining guidelines to provide transparency and objectivity when dealing with fine calculations. For example, in June 2016, People's Republic of China's (hereafter 'China') National Development and Reform Commission (NDRC) published draft guidelines to set out clear and transparent

approaches on determining penalties. Developments of imposing cartel fines in the last 10 years in selected jurisdictions are briefly summarised in Box 1 below.

**Table 2. Cartel fines by year and continent-period 2004-2015 (USD, millions)**

Continent	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Total
Asia	1	387	45	260	89	741	302	1035	1678	834	904	268	6544
Europe	1716	2461	4995	6529	5146	5248	2395	4061	7792	836	5814	2147	49140
Latin America	1	366	228	76	20	46	1855	-	-	6	1421	316	4335
North America	863	4306	1802	1036	2553	493	1733	602	6707	518	8181	783	29577
Other regions	-	-	766	38	346	269	-	241	971	-	380	-	3011
Total	2581	7520	7836	7939	8154	6797	6285	5939	17148	2194	16700	3514	92607

Source: Private International Cartels spreadsheet by John M. Connor (July 2016). \* Other regions include cartel fines imposed by multiple jurisdictions that we were not able to allocate precisely to each jurisdiction.

#### Box 1. Developments of imposing cartel fines in the last 10 years in young jurisdictions

**Brazil** - In 2014, Brazil's competition agency gave six cement companies a combined BRL 3.1 billion (USD 1.4 b) in fines and ordered the firms to sell off certain assets for allegedly participating in a price-fixing cartel for two decades.

**China** - China's National Development and Reform Commission (NDRC) has fined auto parts makers a CNY 1.235 billion (USD 201 m) for price-fixing in 2014. The highest fine of CNY 290.4 million was equivalent to 6% of its annual China revenues of the company. Among them, two companies were exempted from fines as they cooperated in the investigation by providing evidence.

**Colombia** - In 2015, the Colombian Competition Authority (Superintendencia de Industria y Comercio, SIC) issued a decision imposing a total of COP 320.000 million (USD 94.11 m) on 14 enterprises in the sugar production industry. This group includes an association and two enterprises in charge of distribution and commercialization of the product who acted as intermediaries within the collusive scheme.

**Indonesia** - In April 2016, Indonesia's Business Competition Supervisory Commission (KPPU) fined 32 cattle importer and beef feedlot companies with a combined IDR 107 billion (approx. USD 8.1 m) for colluding to withhold beef supply and increase prices.

**Singapore** - In 2014, The Competition Commission of Singapore (CCS) imposed a fine of USD 7.4 million on three ball bearing producers for participating in a ball bearing cartel. The Singapore ruling follows previous cases against the companies brought by the European Commission and the US Department of Justice.

**Chinese Taipei** - In 2013, Chinese Taipei's Fair Trade Commission imposed a record fine of about USD 210.5 m on nine power companies for price fixing. It is the first case on which the commission has levied the maximum fines allowed in its fining guidelines – 10 % of turnover in Chinese Taipei for the preceding fiscal year.

7. Heimler and Mehta argue that when deterrence principles are set as an objective for imposing fines against cartels and abuse of dominance, the optimal fine level for cartels should indeed be higher, as a percentage of turnover, than for abuse of dominance violations.<sup>10</sup> They maintain that as the case of abuse of dominance is not secret in practice, thereby increasing the probability of detection very much, the level of the fine should, therefore, be much lower. They suggest also that the companies with dominance have a better ability to increase prices and further have an incentive to pass on the fine to consumers. In practice, while many competition authorities set a basic fine, some set a different basic fine depending on whether the conduct is related to a cartel or abuse of dominance. In Turkey, the base fine for cartels, which is

between 2% and 4% of global turnover, is higher than other infringements.<sup>11</sup> In Japan, a surcharge rate for cartels is higher than for private monopolisation in the context of small and medium enterprises.<sup>12</sup>

## **2.2 Imposing fines on individuals and companies**

8. Competition laws of most countries provide competition agencies or courts with the power to impose fines on undertakings that commit antitrust infringements. The term “undertaking” is quite broad and encompasses not only legal persons but natural persons. For example, in the EU, an undertaking means any entity engaged in an economic activity, regardless of its legal status, even if that economic unit consists of several persons, natural or legal.<sup>13</sup>

9. In several jurisdictions, agencies or courts can also impose fines on natural persons who committed the infringement in addition to corporate fines. The rationale behind individual fines is that the imposition of fines only on the undertaking cannot achieve optimal deterrence.<sup>14</sup> Undertakings are involved in anticompetitive practices through the conduct of their employees or executives who are natural persons. It could be argued that individual fines may be more effective than corporate fines because corporate fines may cause agency problem.<sup>15</sup> In this sense, Geradin argued that no matter how high corporate fines are levied, the corporate fines cannot deter executives or employees from engaging in cartel activity, especially when the employees’ compensation relates to their own performance.<sup>16</sup>

10. Individual fines may have some stigmatising effect because they may cause loss of credibility and community standing, but individual fines might have limited effect for several reasons. First, companies can reimburse the individuals for the fines easily leading to weakened deterrent effect of the fines.<sup>17</sup> Even if indemnification is prohibited, companies may find several ways not prohibited by law in order to compensate their employees for their loss. However, in a case where individuals are involved in anticompetitive behaviour without the knowledge of the management, they are not likely to be compensated by the company because they actually broke the company’s rules. Second, measuring the optimal fine for individuals may be more difficult than corporate fines given substantial divergence in the methodology employed in calculating personal fines.<sup>18</sup> Even if it is possible, the fines necessary for adequate deterrence may be so high that they might exceed the individuals’ ability to pay.<sup>19</sup> In addition, an optimal fine for deterrence may be disproportionate to the gravity of the infringement.

## **3. Objectives of fines**

11. Most competition authorities pursue one or more objectives with their fining policy: deterrence, punishment, disgorgement or compensation. Some competition authorities may place more emphasis on one objective than another, however, they are not mutually exclusive. For example, most jurisdictions have indicated that imposition of fines is intended to deter undertakings from engaging in the same anticompetitive behaviour in the future and to dissuade other potential violator from joining anticompetitive conduct. At the same time, many jurisdictions have considered punishment as an objective while some mentioned recovery of illegal gains by anticompetitive conduct.<sup>20</sup>

12. The method for setting fines may differ depending upon the objectives competition authorities prioritise. The European Commission explains that fines are ultimately designed to achieve prevention and must hence fulfil punishment and deterrence as objectives.<sup>21</sup> It means that fines should not only punish past behaviour, but also deter that particular undertaking, or any other, from entering into anticompetitive conduct in the future. To this end, fines may be increased to ensure that they have a sufficient deterrent effect and multiple offenders will be fined more heavily. To achieve this, the EC’s 2006 guidelines introduce the concept of ‘entry fee’, a sum equal to 15 % to 25 % of the yearly relevant sales, whatever the duration of the infringement.<sup>22</sup> According to the Guidelines, such an entry fee will be applied in cartel cases and may be applied in other types of antitrust infringements.

13. In Japan, the original objective of the surcharge was to disgorge illegal profits from anticompetitive conduct. To this end, the surcharge rates are set based on the long-term average profit rates in each size of enterprise (large-sized or small and medium-sized) and type of business (manufacturers, retailers or wholesalers). The amount of sales of goods or services related to a cartel multiplied by the surcharge rates would be regarded as economic gain derived from a cartel.<sup>23</sup> Further, in order to enhance deterrence, the JFTC increased the surcharge rate as result of a 2005 amendment to the AMA (Anti-Monopoly Act). For example, the rates were raised from 6 % to 10 % for manufacturers (large-sized). As this increased surcharge rate could exceed the amount of illegal gains, the surcharge would serve as deterrence against cartels.<sup>24</sup> However, the objective of the surcharge was never intended to be punitive. Since only criminal sanctions can be punitive under Japan's legal system, surcharges must play a non-punitive role, if they are to withstand challenge that surcharge is double jeopardy in the courts.<sup>25</sup>

14. In Canada, administrative monetary penalties (AMP) for abuse of dominance are intended to serve as a deterrent, not as a sanction or penalty.<sup>26</sup> The Competition Act stipulates that the penalty is intended to “promote practices by that person that are in conformity with the purposes of [the abuse of dominance provision] and not to punish that person.” To this end, the Act requires the Tribunal to take into account evidence such as the effect on competition in the relevant market and the gross revenue from sales affected by the practice in determining the amount of an administrative monetary penalty.<sup>27</sup>

15. In Chile, in the first place, the antitrust fines levied by TDLC (Tribunal de Defensa de la Libre Competencia) are intended to be punitive. In this regard, severity of behaviour and recidivism would be considered in determining the amount of fines. The second objective of the antitrust fines would be the recovery of illegal gain (disgorgement) which requires considering the economic benefit obtained by commissioning of the conduct. The potential deterrent effect is considered as a third goal of the antitrust fines.<sup>28</sup>

16. In Peru, two antitrust agencies, the Commission for the Defence of Free Competition and the Special Tribunal for the Defence of Free Competition can impose antitrust fines on companies in order to deter future infringements while imposing corrective measures which are aimed at restoring the competitive process (compensatory purpose).<sup>29</sup> To ensure the deterrent effects of fines, the procedure for calculating fines adopts the following steps: 1) establish a base fine; 2) apply criteria for graduation; 3) apply the statutory cap where appropriate; and 4) reduce the fine as the result of a penalty waiver request (leniency programme).<sup>30</sup>

17. In South Africa, the primary objective of administrative penalties is focused on deterrence. Administrative penalties aim to be both a specific deterrent against future anticompetitive behaviour by firms that have contravened law and a general deterrent to other firms that may consider engaging in anticompetitive conduct. To this end, the Competition Commission has published the guidelines which are based on six-stage test. According to the guidelines, the Commission may impute liability on a holding company where its subsidiary has been found to infringe the Act, which would ensure deterrence of anticompetitive conduct.

#### **4. Steps of the fines-setting process**

18. The main steps in setting of fines across jurisdictions may be summarised as following: (i) determination of basic fine; (ii) adjustments (including aggravating and mitigating circumstances); (iii) comparison of fine to maximum limits; and (iv) consideration of the leniency programme.

## 4.1 *Determination of basic fine*

### 4.1.1 *Basis for calculation*

19. Many jurisdictions refer to the turnover/volume of affected commerce of the undertaking as the basis for the calculation of the fine because they consider this concept as a proxy of the illegal gain deriving from anticompetitive conduct or the presumed damage to consumers.<sup>31</sup> Although the jurisdictions may not always refer to the same amount or concept of turnover, it can be observed that they use the concept of relevant turnover as a basis for calculating basic fine.

#### **Box 2. The concept of relevant turnover in selected jurisdictions**

- In Colombia, determination of the base amount of the fine starts with the calculation of the sales value of the company in the affected market during the last financial year in which the conduct was executed<sup>32</sup>.
- In the EU, 'value of sales in the relevant market' (called 'value of sales') is defined as the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA during the last full business year of its participation in the infringement.
- In Korea, 'related turnover' means "the turnover incurred by an enterpriser which commits a violation from selling goods or services in specific transaction areas during the period of violation or the corresponding amount thereof".<sup>33</sup>
- In Germany, the Bundeskartellamt assumes "a gain and harm potential of 10% of the company's turnover achieved from the infringement during the infringement period"<sup>34</sup> according to the Guidelines. The turnover achieved from the infringement is defined in the Guidelines as "the domestic turnover achieved by the company from the sale of the products or services connected with the infringement over the duration of the violation".<sup>35</sup>
- In Hungary, the relevant turnover is referred to as "the net sales revenues of the undertaking on the relevant market for the total duration of the participation in the infringement".
- In Malaysia, 'turnover of the market involved' is defined as "turnover of the enterprise during the period of infringement or, if figures are not available for that business year, the one immediately preceding it".<sup>36</sup>
- In Mexico, the Affected Sales are the product of multiplying the market size by the violator's market share and the duration of the monopolistic practice or prohibited concentration.<sup>37</sup>
- In Singapore, the Competition Commission of Singapore (CCS) considers "the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year".<sup>38</sup>
- In the Slovak Republic, the relevant turnover means the turnover achieved from sale products directly linked to the breach of competition rules.
- In South Africa, 'the affected turnover' is "the firm's turnover derived from the sales of products and services that can be said to have been affected by the contravention".
- In the UK, 'the relevant turnover' is "the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year".<sup>39</sup>
- In Ukraine, the fine shall be calculated based on actual (alternatively expected to be received) turnover from sales to which the infringement directly or indirectly relates.
- In the US, for purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by the participant's principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offence level.<sup>40</sup>

20. In other jurisdictions such as Brazil, India and Turkey, the concept of global turnover<sup>41</sup> is referred to as basis for the determination of the fine. However, there is no agreement on the definition of global turnover. In Brazil, the determination of the fine relates to the company's gross revenues in the last financial year preceding the start of the investigation<sup>42</sup>. In Turkey, while the base fine is being calculated, a rate: a) between 2 % and 4 % for cartels, and b) between five per thousand and 3 % for other violations, of the annual gross revenues of the undertakings, generated at the end of the fiscal year preceding the final decision. In India where fines have been calculated on the basis of total turnover, relevant turnover may be a new basis for calculating fines against cartels.

### Box 3. Relevant turnover as a basis for calculation of antitrust fine in India

India's Competition Appellate Tribunal (COMPAT) has issued several judgments recognizing relevant turnover as a basis for the calculation of fines in cartel cases. The Competition Commission of India (CCI) has been imposing fines on the basis of the total turnover of the company. In *Excel Crop Care Ltd. v Competition Commission of India and Another* in 2013, COMPAT upheld the CCI's findings on merits, but modified the fines levied by CCI by ordering 9% fine on the relevant turnover instead of the total turnover of the company. COMPAT observed that "...It should also be reiterated at this stage that there should be proportionality in the award of penalty, which principle has been enshrined in several judgments of the Apex Court...Generally the award of penalty should be in proportion to the wrong done..."<sup>43</sup> This decision of COMPAT is under appeal before the Supreme Court of India.

In *Hiranandani*, delivered in 2015, COMPAT also held that the turnover for setting fines should be relevant turnover, highlighting that CCI should not set fines, relying on revenues that are not directly related to an infringement. In 2016, COMPAT ordered the CCI to reconsider fines imposed on the 47 LPG manufacturers for big-rigging because the CCI had not considered the relevant turnover of the LPG manufacturers when levying the fines.

#### 4.1.2 The duration of the infringement

21. When setting the fine, the duration of the infringement is taken into account in most jurisdictions. Duration can play an important role in calculation of the fine because the basic amount of the fine is calculated as a percentage of relevant turnover connected with the infringement, multiplied by the duration of the infringement. Furthermore, some jurisdictions consider the duration as an aggravating or mitigating factor in adjustment of the basic fine.<sup>44</sup> However, some slight differences in calculation method may exist between jurisdictions.

### Box 4. The duration of the infringement in selected jurisdictions

- In the Czech Republic, there are three categories for the duration of the anticompetitive conduct: short-period anticompetitive conduct (from 0 up to 1 year), medium-period (from 1 up to 10 years) and long-period (longer than 10 years).
- In Japan, there is a limitation on the duration of the infringement that can be considered. The maximum duration is three years, therefore when the period of infringement is longer than three years, the duration shall be limited to three years.
- In the EU and Malaysia, the number of years of infringement is taken into account. However, periods of less than six months will be considered as half a year, while periods longer than six months but shorter than one year will be counted as a full year.
- In other jurisdictions such as Korea, the US and South Africa, the length of the duration of infringement will be fully counted in determining the fines.

22. The methodology by the Czech Republic, the EU and Malaysia might ease the task for the competition authority to determine the initial date and the ending date of the infringement. On the other hand, in jurisdictions where the entire duration of the infringement should be accurately reflected like Korea, the US and South Africa<sup>45</sup>, the authorities may bear a heavy burden to prove the start date and the end date of the infringement. In these jurisdictions, courts may annul the total amount of fines if there is insufficient evidence proving the starting date or ending date.

#### 4.1.3 How calculations work: Determination of a percentage of relevant or total turnover

23. The basic amount of the fine will relate to a proportion of relevant turnover, depending on the gravity of the infringement and the duration.

**Table 3. Maximum base fines**

Jurisdiction	Maximum % of relevant turnover for base fine
Czech Republic	3% (up to 3% on the most serious infringements; up to 1% on serious infringements; and up to 0.5% on less serious infringements)
Colombia	30%
Germany	30%
The EU	30%
Japan	Depending on the size of enterprise and the type of business
Korea	Up to 2% for abuse of dominance (very serious: 1.5-2%; serious: 1-1.5%; less serious: 0.3-1%); up to 10% for cartels (very serious: 7-10%; serious: 3-7%; less serious: 0.5-3%)
Italy	30%
Mexico	1 500 000 times the general minimum wage in the Federal District
The Netherlands	30% (less serious-start with 10% serious-start with 10-20% very serious-start with 15-30%)
Portugal	30%
Slovak Republic	30%
South Africa	10% of the firms turnover derived from or within South Africa
The UK	30%
Ukraine	45%
The US	20-40%
Turkey	3% for abuse of dominance, 4% for cartels of annual gross revenues

Source: Latin America Competition Forum Session I: Criteria for setting fines for competition law infringements background note by OECD secretariat and national legislations.

24. The European Commission reflects the gravity of an infringement by taking a proportion of the value of sales (in the last full business year and before tax). Generally the proportion of the value sales will be set at a level up to 30% of the value of sales depending on the gravity of the infringement, which in turn depends on several factors, including the nature of the infringement (e.g. the abuse of market dominance, price fixing, market sharing), the geographic scope, and whether the infringement has been implemented.<sup>46</sup> Accordingly this level varies on a case by case basis. For cartels, the proportion tends to be in the range of 15-20%. The Commission will add a sum equal to 15% to 25% of the yearly relevant sales (so called "entry-fee") to deter undertakings from entering into price fixing, market sharing and output limitation agreements.<sup>47</sup> The Commission may also add the entry-fee to other infringements.

25. In South Africa, the Competition Commission will calculate the base amount of the administrative penalty to be imposed with reference to the firm's affected turnover. The base amount will be calculated as a proportion of the affected turnover on a scale from 0% to 30% depending on several factors: the type of infringement (the higher end of the scale being reserved for the more serious types of anticompetitive conduct such as price fixing); any loss or damage suffered as a result of the contravention;

and the market circumstances in which the contravention took place. The amount obtained is then multiplied by the number of years that the contravention took place.

26. In Japan, the JFTC also adopted the concept of the relevant turnover<sup>48</sup> as a basis of fines and the amount of basic fines is calculated as the percentage of relevant turnover. The percentage of relevant turnover (surcharge rate) depends on the type and size of business. The AMA (Anti-Monopoly Act) was amended in 2009 and the 2009 amendment introduced an increase of the surcharge rate.<sup>49</sup> The percentage for a large sized manufacturer and retailers from a cartel offence would be set at 10% and 3% respectively, while the small and medium-sized manufacturers would be set at 4% and 1.2% respectively. The difference is based on the average sales amount of operating income according to a type of industry in the corporate statistics from 1978 till 1989. At that time, it was reported that operating income rate of small and medium-sized business (SME) was lower than that of a big business. Due to this calculation, the surcharge rates for SME were set lower.

27. Several jurisdictions divide all antitrust infringements into several groups depending on their seriousness in order to determine the amount of basic fines. In Ukraine, the amount of basic fine depends on the seriousness of the infringement and can be defined as a percentage that may be set at a level of 1% to 45% of the turnover. Infringement will be put into one of four categories: (i) very serious infringements (traditionally, price fixing and abuse of dominance) with the basic fine amount of 45% of turnover from sales or expenses of the buyer directly or indirectly linked to the infringements; (ii) serious infringements (e.g., failure to obtain the merger clearance of the AMC for the merger which led to market monopolization) – 30% respectively; (iii) medium-gravity infringements (e.g., failure to obtain the merger clearance of the AMC for the merger which did not constitute monopolization) – 5% respectively; for unfair competition - 30% respectively; and (iv) minor infringements (e.g., failure to timely provide information at the request of the AMC) – with the fine amount fixed in a flat fee.

28. In Korea, surcharge imposing percentages are classified into three categories depending on the degree of seriousness: highly significant violation (7-10% for cartels, 1.5-2% for abuse of dominance); significant violation (3-7% for cartels, 1-1.5% for abuse of dominance); and weakly significant violation (0.5-3% for cartels, 0.3-1% for abuse of dominance).

29. Ecuador also classifies violations as minor, serious or very serious: the amount of fines for minor violations may be increased to up to 8% of the total turnover of the company or economic operator in the preceding year; the amount of fines for serious violations may be increased up to 10 %; and the amount of fines for very serious violations may be increased up to 12 %.

30. In the Czech Republic, the basic amount of fines shall be set as the share of the value of sales (basic share) multiplied by the time coefficient. Basic share is set depending on the degree of gravity of the illegal conduct: (i) up to 3% of the value of sales on the most serious infringements; (ii) up to 1 % of the value of sales on serious infringements; and (iii) up to 0.5 % of the value of sales on less serious infringements.

31. Some jurisdictions determine the basic amount of the fine in accordance with a formula. In Mexico, the Federal Competition Commission (CFC) follows a two-phase process when setting the base fine. The first stages involves multiplying the *Affected Sales* by a factor that reflects the damage caused by the punishable conduct (called the *Damage Factor*) while the second stage multiplies the result of the first stage by a factor that reflects the seriousness of the conduct (called the *Severity Factor*):  $BF(\text{Base Fine}) = AS(\text{Affected Sales}) \times DF(\text{Damage Factor}) \times SF(\text{Severity Factor})$ .

32. In the US, the basic amount of fines for bid rigging, price fixing or market allocation agreements is generally set at 20% of the volume of affected commerce.<sup>50</sup> The 20 % figure was decided according to the empirical results of the sentencing guidelines at the time of their introduction in 1987 that the average overcharge levied by collusion is estimated as 10 %. The figure representing the average overcharge (10%) was doubled because of accounting for losses such as customers who are priced out of the market.<sup>51</sup>

33. As calculations vary among jurisdictions, the basic amount of fines also can be different with the same facts. Suppose there is a cartel that lasted for 4 years. The first year's value of sales amounts to USD 100 million while second, third and fourth year's value of sales are USD 80 million, 60 million and 40 million. In this case, the European Commission considers only the fourth year's value of sales (40 million) because the Commission takes the value of the firm's sales in the last full business year for calculating fines. On the other hand, other jurisdictions such as Germany consider each year's value of sales because the affected commerce is taken as the turnover of the firm over the period of the infringement.

34. This method of the Commission could lighten burden to calculate value of sales although it may not reflect the exact amount of value of sales. It is more meaningful if the agency calculates the value of sales of long lasting cartels. For example, a cartel lasts for more than 10 years, and if the agency in jurisdictions like Germany has to calculate relevant turnover of each year during the infringement, it may be extremely difficult or impossible. Thus, courts may reject the decision because they consider that there is insufficient evidence to prove the amount of relevant turnover. However, for cartels with declining revenue, the method of the Commission could lead to lower fines.<sup>52</sup>

#### **4.2 Adjustment of the basic fine: Aggravating and mitigating circumstances**

35. In most jurisdictions, the base fine is generally adjusted further by considering aggravating and mitigating circumstances. Table 3 shows common circumstances but is not meant to be exhaustive. In this section, we will discuss those circumstances, focusing in particular on the most common and important ones.

**Table 4. Aggravating and mitigating circumstances**

<b>Aggravating Circumstances</b>	<b>Mitigating Circumstances</b>
Recidivism	Effective compliance policy
Leading role or instigate in infringement	Minor role
Coercion or retaliatory measures to ensure continuation of the infringement	Pressure exercised by other companies
Refusal to co-operate	Co-operation with competition authority
Continuation of the infringement after start of competition authority's investigation	Immediate termination of the infringement
Awareness of the illegal nature of the conduct (committed Intentionally)	Uncertainty as to existence of an infringement
Institutionalised nature of the infringement	Motivated by Public authorisation/encouragement
Significance of the industry influenced	Non-implementation of the infringement
Involvement of director or high-level executives	Slow reaction/excessive length of procedures before the competition authority
Violation of an injunction or condition of probation	Compensation of injured parties
Size of firm	Acceptance of responsibility

Source: ICN Setting of fines for cartels in ICN jurisdictions (2008); Latin America Competition Forum Session I: Criteria for setting fines for competition law infringements background note by OECD secretariat (2013); and national legislations.

#### 4.2.1 *Recidivism*

36. Recidivism features as the most common aggravating factor, with repeat infringers<sup>53</sup> facing increased fines in most jurisdictions. It appears that increased fines for recidivists are necessary, since such companies were not effectively deterred from violating competition law by the fines already imposed upon them, thereby show a propensity to infringe competition law.<sup>54</sup>

37. Several issues have arisen regarding recidivism. First, when recidivism relates to “the same or similar” infringements<sup>55</sup> like the EU, it is not obvious what is meant for “the same or similar” infringements.<sup>56</sup> For example, it is not clear whether all or only a few infringements of Article 101 TFEU are the same or similar.

38. Second, recidivism covers repeated conduct of the “same legal entity”.<sup>57</sup> These days, many firms often merge or acquire other firms. Also, a big company can be split into several ones. In this case it is not clear which firm should be treated as a repeat infringer or whether all firms can be considered as repeat infringers. In jurisdictions where parental liability is applied, this issue may be more complicated (see 5.1. Parental liabilities).

39. The third is about the limitation period of the range of prior infringements. There is a limitation period in some jurisdictions after which recidivism cannot be established. In France recidivism can normally be found in situations where the second infringement has started within 15 years from the date on which the first decision has ended. Recidivism in Japan and Spain covers 10 years between the first finding of infringement and the start of the second infringement. The prior infringement must also have occurred within the last 10 years in the US. In Germany, 5 years must not have elapsed until the second infringement. However, in some jurisdictions, there appears no definite limitation period between infringements. For instance, the EC’s 2006 fining guidelines do not contain a maximum period of time between the start of the new infringement and the first finding of infringement. However, the Commission would not take account of recidivism without any limitation in time because the principle of proportionality requires the Commission to consider whether the infringements justify a fine increase on account of recidivism.<sup>58</sup> Geradin argues that limitation would be 10 years because prior infringements that took place more than 10 years ago bear no relationship to current illegal conduct due to the frequent rotation of executives.<sup>59</sup>

40. The last issue is how much fines should be increased due to recidivism. Although competition authorities consider recidivism as aggravating circumstances in common, there are different positions among the authorities on the question of how much fines should be increased for repeat infringers. In the EU the 2006 Fining guidelines stipulate clearly the increase for recidivism will be up to 100% of the basic amount for each such infringement established. Also, in Lithuania and Brazil, the basic amount of the fine may be increased up to 100 % for each earlier infringement. In Japan and Korea, the law provides for the amount of fines to be increased by 50%. In the US, prior history increases the culpability score up to 2 points thereby raising the maximum fine by up to 16%.<sup>60</sup> Wils suggested that like the Commission practice, increasing fines by 50% in case of one prior infringement and 60% in case of two prior infringements thus again can be considered reasonable.<sup>61</sup>

#### 4.2.2 *Role of the undertaking in the infringement*

41. Most authorities consider the role as leader in the infringement as an aggravating factor because authorities believe that a company that takes the role of a leader or instigator bears a special responsibility. For example, In the EU, this aspect may increase the basic amount of fine by up to 50%. By contrast, some authorities may reduce the amount of fine if the infringer has been in a more passive or following role compared to other participants. The rationale behind this adjustment is that the differentiation of fines

depending on the role played by the different cartelists is an effective instrument to raise the cost for those most active in operating a cartel.<sup>62</sup>

42. In practice, the fines are often not imposed the way they were intended because leaders may receive a significant reduction of fines from mitigating circumstances such as co-operation with authorities or leniency programmes. Bos and Wandschneider analysed 75 fining decisions of the European Commission between 2000 and 2010, and found leadership was identified and considered as an aggravating factor in 14 cases.<sup>63</sup> Cartel ringleaders received an increase of the basic fine in the range of 30 % to 85 %. However, the ringleaders received a substantial reduction of the range of 10% to 50 % in 10 cases mainly due to leniency programmes.

#### **Box 5. Role of the undertaking in the infringement in selected jurisdictions**

- In Colombia, checklist of the required information by the Deputy over each investigated party includes role of the undertaking in the conduct.
- In the EU, the fining guidelines consider the role as leader in, or instigator of, the infringement, steps taken to coerce other undertakings to participate and retaliatory measures taken against other undertakings as aggravating circumstances.
- In Ecuador, aggravating circumstances include instigation to commit a violation.
- In Malaysia, when the offender played relatively minor role in the infringement especially if involvement is secured by threats or coercion, this factor may be taken into consideration as mitigating factors.
- In Singapore, aggravating factors include (i) role of the undertaking as a leader in, or an instigator of, the infringement; and (ii) retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement.
- In South Africa, the Commission will adjust this figure upwards or downwards, depending on the nature of the firm's involvement in the contravention i.e. whether the firm was proactive in initiating the contravention, whether it was a passive participant or whether it was coerced by other firms who are party to the contravention.
- In Turkey, the base fine may be increased by up to one fourth in cases such as coercing other undertakings into the violation.
- In Ukraine, the basic amount may be increased up to 50% in case the company played a role of leader or instigator of the infringement.

#### *4.2.3 Co-operation with the investigating authorities*

43. The most common mitigating factor is willingness of co-operation. Co-operation may be taken into account as a mitigating factor or it may result in reductions in fines under the leniency notice at the end of the fining decision, depending on the usefulness of the co-operation with the authorities. This factor would lead to saving of resources because the authority can obtain evidence proving cartels more quickly and at lower costs through co-operation from the cartel member. However, if co-operation means providing robust evidence concerning cartels, this factor would provide infringers such as ring leaders with more reductions of the fines because the leader of the infringement may have more evidence than other cartel participants.

**Box 6. Co-operation with the investigating authorities in selected jurisdictions**

- In Chile, when determining the amount of fines the Antitrust Court may consider the cooperation provided to the FNE before or during the investigation.<sup>64</sup>
- In Colombia, checklist of the required information by the Deputy over each investigated party includes cooperation or obstruction in the investigation.
- In Ecuador, alleviating circumstances include the active and effective collaboration with the Superintendency in the investigating proceeding.
- In the EU, the fining guidelines grants a reduction of the fine to infringers when the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so.<sup>65</sup>
- In Mexico, Cooperation with the Federal Competition Commission (CFC), over and above the violator's legal obligations, which allowed the proceeding to be concluded in a more expeditious or effective manner will be taken into account as mitigating circumstances.
- In the US, the Federal Sentencing Guidelines decreases the culpability score by five points if the organisation reported the offense to the appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its conduct. If the organisation did not self-report, but fully cooperated in the investigation and clearly demonstrated recognition and affirmatively accepted responsibility for its conduct, the culpability score is subtracted by two points. Finally, if organisation did not self-report or cooperate, but clearly demonstrated recognition and affirmative acceptance of responsibility for its conduct, the culpability score is subtracted by one point.<sup>66</sup>
- In Slovak Republic, cooperation of the undertaking with the Antimonopoly Office of the Slovak Republic (AMO) to the extent of exceeding its legal obligations will be taken into account as a mitigation factor.<sup>67</sup>
- In Singapore, co-operation which enables the enforcement process to be concluded more effectively and/or speedily is considered as a mitigating factor.
- In Lithuania, assistance to the Competition Council in the course of investigation and acknowledgement of the material circumstances established by the Competition Council in the course of investigation shall be considered as mitigating circumstances.<sup>68</sup>
- In Turkey, in case the undertakings or associations of undertakings that engaged in other violations admit their violations and make active cooperation, the fine shall be reduced by one sixth to one fourth.
- In Ukraine, the basic amount may be decreased up to 50% in case of effective cooperation with the competition authority in the proceedings.

*4.2.4 Compliance Programme*

44. Implementation of antitrust compliance programmes may result in decrease of the fine in some jurisdictions. However, there is no consensus on whether competition law infringers that have antitrust compliance programmes should receive lighter (or heavier) sanctions. Consequently, there are different views of considering compliance programme as a mitigating factor.<sup>69</sup> Some maintain a substantial fine reduction should be granted for companies with effective compliance programme. Further, a few commentators argue that “if a company has made a reasonable effort to comply with the antitrust law, and

an employee nevertheless engages in price-fixing, then it makes no sense to fine the corporation, or to sanction the directors or officers.”<sup>70</sup>

45. Those who are opposed to the idea argue competition agencies should not give any credit for a compliance programme because it did not work at all. In addition, granting reductions will actually encourage anticompetitive activities by making them cheaper. Further, it is almost impossible for competition authorities or courts to distinguish sham programme from genuine ones at reasonable cost.

46. Some authorities like the European Commission assert that they do not regard compliance programmes as an aggravating factor or mitigating factor.<sup>71</sup> Recently in a growing number of jurisdictions, the adoption of a compliance programme should be considered as an attenuating circumstance justifying a reduction in the fine.

- In 2016, the Brazilian Competition Commission (CADE) published guidelines on competition compliance programme. CADE guidelines emphasise that only a robust compliance programme could result in a reduction of fine levels imposed by CADE. The guidelines indicates that it is possible for CADE’s Tribunal to consider the compliance programme as (i) evidence of good faith and a mitigating factor when stipulating the fine, resulting in its reduction or as (ii) criterion to be considered when calculating the pecuniary contribution to be paid by the company, in case a settlement agreement is signed, which could take the discount percentage to the maximum allowed.<sup>72</sup>
- In Chile, the antitrust agency (FNE) is able to treat the existence of a compliance programme as a mitigating factor. In 2012, FNE launched Chile’s first antitrust compliance guide titled Guidelines for Competition Law Compliance Programmes. The FNE Guidelines set four essential requirements that are well-known features in the field: (i) a real commitment to comply with competition regulations; (ii) the identification of current and potential risks faced by the firm; (iii) internal mechanisms and procedures that accord with the commitment to comply; and, (iv) the participation of Managers and/or Directors in the Compliance Programme.
- In Malaysia, in determining the amount of any financial penalty, existence of a compliance programme is considered.
- In Singapore, a reduction is available for adequate steps taken with a view to ensuring compliance with antitrust laws, for example, existence of any compliance programme.
- In the US, the Sentencing Guidelines grants a possible reduction in a fine if a convicted corporation had in place, at the time of the infringement, an effective compliance and ethics programme. Nonetheless, for two decades DOJ had refused to consider a company’s compliance programme as mitigating factors in antitrust infringements. However, recently DOJ has recommended a lower fine in the face of evidence that companies took culture- changing efforts to improve their compliance programmes for the future.<sup>73</sup>

47. By contrast, Korea revised the fining guidelines in order to stop considering a compliance programme as a mitigating factor in the setting of the fine because the authority found that some companies adopted sham compliance programme only to simulate a purported interest in complying with antitrust laws.

48. The KFTC granted some incentives like surcharge reduction for companies which faithfully implemented the compliance programme. However, in 2005, the Compliance programme (CP) faced criticism on its effectiveness, because some companies were found to unfaithfully operate the CP merely for the benefit of surcharge reduction. The companies infringed competition law despite companies’

CP operation. In response, the KFTC introduced the CP evaluation programme to provide grades based on evaluation of the CP performance in 2006. Nonetheless, in 2014 the KFTC amended the Detailed Guideline for Calculation of Administrative Fine to abolish a mitigating factor based on model design and operation of the Fair Trade Self-Compliance Programme. The factor used to be applied to companies that received at least a CP rating of A. However, a separate mitigating factor (up to 10% mitigation) has been introduced for companies which committed infringements due to unforeseeable reasons despite the implementation of self-compliance measures.

### 4.3 Statutory limits on fines

49. Proportionality is an important legal principle across jurisdictions. Therefore, the applicability of the principle of proportionality to antitrust fines cannot be questioned. Interpreting this principle in terms of the fine structure, antitrust fines should not exceed what is necessary to effectively sanction and achieve an adequate level of deterrence.<sup>74</sup> To this end, most jurisdictions have instituted maximum fining cap for undertakings. These aim to avoid fines at a disproportionate level that undertaking will not be able to pay. Another reason why most jurisdictions have maximum statutory limits is to ensure that antitrust fines cannot jeopardise the viability of the company.<sup>75</sup> High fines may lead to bankruptcy which causes a reduction in the number of active competitors in a market.

**Table 5. Maximum fines by type of offender in selected jurisdictions**

	Maximum fine for corporations	Maximum fine for individuals
<b>Brazil</b>	20% of undertaking's (including group of companies) gross revenue in the year prior to the beginning of the investigation	between 1 to 20% of the fine imposed on their company
<b>Canada</b>	For price fixing, up to CDN 25 million; for bid-rigging, the fine is at the discretion of the court; and for abuse of dominance, up to CDN 10 million.	For price fixing, CDN 25 million; for bid-rigging a fine at the discretion of the court
<b>Chile</b>	20 000 tax units (approx. USD 19 million) for abuse of dominance or non-cartel offences, 30 000 tax units (approx USD 28.5 million ) for cartels	30 000 tax units (approx. USD 28.5 million)
<b>Colombia</b>	10% of the total income during the last complete financial year and 100 000 current monthly minimum legal wages (CMMLW) (USD 30 million) or 150% of the income resulting from the infringing conduct	2,000 CMMLW (USD 700 000)
<b>Dominican Republic</b>	For non-cartel abuse, between 200 and 3000 times the minimum wage; for cartel, between 30 time and 3000 times the minimum wage	The law No. 42-08 does not make any distinction between individuals and corporations.
<b>Ecuador</b>	Minor violations: 8% of the undertaking's total turnover in the prior financial year; Serious violations: 10% of total turnover Very serious violations: 12% of total turnover	USD 150 000
<b>EU</b>	10% of total world-wide turnover during the last financial year	Not Applicable
<b>France</b>	10% of world-wide turnover in the preceding year	EUR 75 000
<b>Germany</b>	10% of undertaking's world-wide turnover	EUR 1 million (bid-rigging only)
<b>Japan</b>	10% (large, manufacture), 3% (large, retailer), 2% (large, wholesale) of the sales amount of the relevant goods or services up to 3 years	JPY 5 million

<b>Korea</b>	Cartel - 10% of the undertaking's relevant turnover Abuse of dominance - 3% of the undertaking's relevant turnover	KRW 200 million
<b>Mexico</b>	8% annual turnover for relative monopolistic practice and 10% of annual turnover for absolute monopolistic practice	200 000 times the general minimum wage in the Federal district – approx. USD 1 million
<b>The Netherlands</b>	the greater of EUR 450 000 or 10% of the undertaking's world-wide turnover in the financial year preceding the decision	Not applicable
<b>Peru</b>	Mild – 500 Tax units and 8% of income Severe – 1000 Tax units and 10% of income Very severe – 12% of income	100 Tax units (approx. USD 133 000)
<b>Portugal</b>	10% of turnover in Portugal during previous year	10% of the annual income of the individual
<b>Slovenia</b>	10% of the turnover realised the preceding financial year	EUR 30 000
<b>South Africa</b>	10% of turnover in South African and the firm's exports from South Africa in the preceding year	ZAR 500 000
<b>Spain</b>	10% of total turnover in the preceding business year	EUR 60 000
<b>The UK</b>	10% of total world-wide turnover	Magistrate Court: GBP 5 000, Crown Court: no limit
<b>The US</b>	USD 100 million or twice the pecuniary gains derived from the criminal conduct or twice the pecuniary loss caused to the victims of the crime	USD 1 million or twice the gross pecuniary gains the offenders derived from the crime or twice the gross pecuniary loss caused to the victims of the crime
<b>Venezuela</b>	20% of the undertaking's gross turnover	There is no distinction between the penalties applied to corporations or individuals.

Source: Latin America Competition Forum Session I: Criteria for setting fines for competition law infringements background note by OECD secretariat (2013), antitrust sanctions (2010) and national legislations.

50. The maximum fine cap may take the form of a specific monetary amount or be a percentage of some variables such as global turnover. Most jurisdictions prefer a percentage of global turnover as limits (see Table 5). However, it can be argued that this type of limit may violate the principle of equal treatment.<sup>76</sup> Equal treatment concerns may be invoked because total world-wide turnover of mono-product companies may be much lower than total world-wide turnover of multi-product international companies thereby creating a substantial difference in the amount of fines between a mono-product company and a multi-product company. Other jurisdictions like Korea take other forms like a percentage of relevant turnover, which could avoid violating the principle of equal treatment but cause high fines for some companies such as mono-product companies.

**Box 7. Change of limits on surcharges in Korea**

In 2006, eight flour companies in Korea were found to have colluded to control supply and price of flour which is a main ingredient for the food industry in Korea. The eight flour companies colluded over six years from January 2000 to February 2006, and raised flour prices five times.

The KFTC imposed a surcharge of KRW 43.4 billion on eight wheat flour companies. The imposed surcharge amounted to KRW 12.164 billion for Company A, KRW 6.630 billion for Company B, KRW 8.236 billion for Company C, KRW 4.766 billion for Company D, KRW 3.203 billion for Company E, KRW 3.230 billion for Company F, KRW 1.672 billion for Company G and KRW 3.416 billion for Company H.

In this case, there was a problem with limits on antitrust fines because when a long-term cartel is detected, Company H, the company manufacturing only one item, flour, would benefit from the limits on surcharges which amount to 10 % of annual turnover while companies manufacturing multiple items would not, thus causing a significant inequality in the amount of surcharges imposed on different companies participating in the same cartel.

In the wake of flour cartel, with the amendment of the Enforcement Decree of the MRFTA, the limits on surcharges imposed for antitrust infringements was changed from a certain percentage of the "previous three-year average sales" (different according to the type of violation; 10 % for cartel, 3 % for abuse of market dominance and 2 % for unfair trade practice) to a certain percentage of the "relevant turnover".<sup>77</sup>

51. A jurisdiction may have a different approach to a percentage of the global turnover, although the jurisdiction does not allow fines for competition law infringements to exceed 10% of the undertaking's global turnover like the European Commission. In Germany, the 10% maximum in German competition law is not a cap but the maximum fine.<sup>78</sup> The entire fine must be set below 10% of the global turnover and a fine of 10% can be levied only for the worst conceivable antitrust infringements, such as price fixing over a long period.<sup>79</sup>

**Box 8. 10% of global turnover as the upper limit of fines in German competition law**

Fines in European and German competition law should not exceed 10% of the undertaking's worldwide turnover. Art. 23 (2) of Regulation (EC) 1/2003 says "For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year." Section 81 (4) second sentence of the German Act against Restraints of Competition contains a similar wording and has in fact been introduced to maintain consistency with EU law.

However, on 26 February 2013, the German Federal Supreme Court held that the statutory maximum level of 10 % could not be interpreted as a cap similar to that in EU law but the upper limit of the fining range.<sup>80</sup> In the wake of this ruling, the German Federal Cartel Office (FCO) may only impose fines up to the 10% ceiling for the most serious infringements of competition law.

Since the fine calculation in Germany started with a certain percentage of the turnover relating to the cartelised product, the calculation of fines for small and medium-sized enterprises (SMEs) often resulted in a level of the fine that came close to or exceeded 10% of the world-wide turnover because the cartelised product accounted for a large portion of SME's turnover. For this reason, a fine of 10% of their world-wide turnover could be imposed on SMEs even if their infringements were not particularly serious.

Interpretation by the German Federal Supreme Court would lead to lower fines for SMEs. On the other hand, large companies may face the risk of higher fines than before. In response to this ruling, the FCO revised its fining guidelines in June 2013.

#### **4.4 Inability to pay**

52. As fines imposed by competition authorities for breaches of the competition laws have increased substantially in recent years, companies often claim that imposition of high fines could drive them out of the market. Inability to pay as a circumstance to be considered is taken into account when most competition authorities impose fines on companies. Some competition authorities believe that the fine cannot be as high as to put a company out of business, thereby causing losing competitors. Others consider another factor such as the fact that the fine would impair the company's ability to make restitution to victims. In some jurisdictions, provisions setting a statutory maximum fine are considered as a method of taking the ability to pay into account.<sup>81</sup>

53. The European Commission recently accepted claims for inability to pay under paragraph 35<sup>82</sup> of the 2006 fining guidelines and decided to reduce substantially fines in order to avoid undermining the firms' financial viability.<sup>83</sup> There are several principles applied by the Commission to inability to pay claims.<sup>84</sup> First, sufficient financial data is needed to allow the Commission to analyse the economic viability of the company. Second, a causal link between the risk of bankruptcy and the fine should be proved. Third, a fine reduction may be granted only if the fine would cause the company's assets to lose all or most of their value. Finally, the Commission will take account of the social and economic context, focusing in particular on whether any insolvency and bankruptcy would cause overcapacity, falling demand or other negative economic indicators. The Commission's policy on inability to pay claim is often criticised mainly due to a lack of transparency surrounding fine reductions.<sup>85</sup> Although it is important to protect confidential information and business secrets, there seems to be little transparency. For example, a 2010 animal feed phosphates press release does not identify the recipients of the fine reduction. Fine reductions, particularly without sufficient transparency, can cause distrust for the Commission and the potential for bias.<sup>86</sup>

54. As box 9 below describes how jurisdictions consider a company's financial status including inability to pay.

### Box 9. Inability to pay claim in selected jurisdictions

#### European Union

In 2012, the European Commission imposed a total of EUR 1.5 billion on seven groups of companies for participating in either one or both of two international cartels in the sector of cathode ray tubes (CRT). Between 1996 and 2006, these companies fixed prices, shared markets, allocated customers between themselves and restricted their output. EU Competition Commissioner Joaquín Almunia said "*These cartels for cathode ray tubes are 'textbook cartels': they feature all the worst kinds of anticompetitive behaviour that are strictly forbidden to companies doing business in Europe...*".

One of the companies had applied under point 35 of the 2006 fines Guidelines for a reduction of the fine, claiming its inability to pay the fine. The Commission assessed this claim and granted a reduction of the fine. According to a source<sup>87</sup>, the Commission granted a reduction of the fine—EUR 219 million. The company received a first 10-% reduction for cooperating with the authority under the leniency programme, reducing the fine to EUR 257.5 million, before being further reduced to EUR 38.6 million on the basis of inability to pay. The EUR 219 million fine reduction is the largest since the Commission began accepting a claim for inability to pay under point 35 of the 2006 fines Guidelines. The company, which obtained a reduction of the fine based on the claimed inability to pay, filed for bankruptcy in 2009 and later underwent a debt-restructuring plan. Since then, the company has published yearly losses of between EUR 69 million and EUR 342 million, according to its 2011 financial report.

#### India

There are no provisions for reductions of fine amounts on the basis of inability to pay in the Competition Act and regulations. However, a fine may be reduced on such grounds depending upon facts and circumstances of a given case and, more specifically, upon the CCI's discretion. In the common judgment *M/s. United Phosphorus Limited vs the CCI, M/s. Excel Crop Care Limited vs the CCI and Sandhya Organic Chemicals (P) Limited vs the CCI*, the COMPAT brought a reduction the penalty of one of the companies, namely M/s. Sandhya Organic Chemicals (P) Ltd, to one-tenth of the penalty imposed by the CCI, on the basis that the capacity and size of the company was significantly smaller than that of the other two companies.<sup>88</sup>

#### South Africa

The Competition Commission consistently refused to consider a company's inability to pay the fine when determining what it will accept in order to settle competition law cases, presumably because it is afraid of setting a precedent.<sup>89</sup> In a consent order case between *New Reclamation Group and the Commission (CT Case No: 37/CR/Apr08)*, the Competition Commission highlighted that the firm's inability to pay penalty is not one of the circumstances which it must consider, and that its main concern is to ensure that the penalties are sufficient enough to have a significant deterrent effect.<sup>90</sup> However, the newly introduced Guidelines indicate that the Commission may, after determining an appropriate administrative penalty and in exceptional circumstances, consider the firm's ability to pay the administrative penalty. The approach<sup>91</sup> in the Guidelines looks similar to paragraph 35 of the EU fining guidelines.

#### The United States

Under §8C3.3 of the Federal Sentencing Guidelines, a judge can reduce a fine to the extent that imposition of such fine would impair a company's ability to make restitution to victims. One company of the DRAM cartel occurring between 1999 and 2002 and the DOJ agreed upon a USD 185 million fine. According to the Sentencing Guidelines, the company's fine should have amounted to USD 265.5 million, but, in 2005, the DOJ reduced its recommendation on account of the company's inability to pay.

55. These fine reductions may have the potential to undermine the legitimacy and credibility of the competition authorities, and therefore must be implemented with specific, objective, and transparent criteria. There are several alternatives available to competition authorities to maintain deterrence without increasing the likelihood of bankruptcy.<sup>92</sup> Some authorities provide for extended payment periods or payment in instalments rather than fine reductions. For example, in South Africa, the Competition

Commission allows companies to pay fines in instalments. In August 2016, The Commission has reached an agreement with ArcelorMittal South Africa Limited (AMSA) that it agrees to pay an administrative penalty of ZAR 1.5 b (USD 110 m) for being involved in cartels in long steel and scrap metal.<sup>93</sup> AMSA will pay the fine in instalments of at least ZAR 300 million annually over five years starting in 2017.

#### **4.5 Interactions with Leniency Programme**

56. After the fine has been determined, reductions in fines for leniency programme may be considered in cartel cases. For example, the fine so determined may be reduced in accordance with the Leniency Notice in EU. The application of the 10 % turnover limit before any reductions under the Leniency Notice ensures that there remains a sufficient incentive to make use of the Leniency Programme.

57. Well-designed and administered leniency programmes increase the probability of detection and undermine trust among cartel participants. However, poorly designed leniency programmes that provide too generous reductions in fines will be exploited thereby reducing deterrence. Some scholars claim that cartels may exploit leniency programmes by considering leniency applications in their strategy in order to maximize the benefits of fine reduction.<sup>94</sup>

### **5. Practical issues in determining fines**

#### **5.1 Parental liability**

58. In jurisdictions where an undertaking covers an entity or group of entities which function as a single economic entity, parent companies not directly involved in the infringement are sometimes held liable for an antitrust infringement under the principle of parental liability. Whether a parent company can be held liable for anticompetitive conduct of a subsidiary or other related company has been disputed for years.<sup>95</sup> On this issue, jurisdictions vary in their positions. In some, corporate separateness and formalities must be respected.<sup>96</sup> Accordingly, in these jurisdictions, as a general rule, mere 100 % ownership of a subsidiary will not attribute liability to the parent company for a subsidiary's conduct; nor does it create a presumption that the parent company exercises the degree of control over the subsidiary necessary to impute liability on the parent company for the subsidiary's conduct. However, in other jurisdictions such as Brazil, the EU and South Africa, fines may not only be imposed solely on the legal entity actually involved in the infringement but also on other responsible companies within the same economic unit.

#### **Box 10. Parental liability in selected jurisdictions**

##### **Brazil**

With the amendment of the competition law (law no.12,529/2011) in 2011, the new fines range between 0.1 and 20 % of the company's – or group's – gross revenues in the financial year preceding the beginning of the authority's investigation, being limited to the 'business segment' in which the wrongdoing occurred. This means that the fines are no longer calculated based on the total gross revenues of the company, but on the revenues of the business segment in which the conduct occurred. The previous law provided for a fining range of 1 % to 30 % of the company's gross revenue.

##### **EU**

EU competition law apply to "undertaking", which covers any entity engaged in economic activity, regardless of its legal status. The concept of an undertaking is not defined in the EU Treaties and/or regulations. In the case of *Akzo Nobel v Commission* in which the CJEU held that "[...] the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company."

In order to impute liability to the parent company for a subsidiary's behaviour, the Commission does not need to prove that the parent company played any material role in the perpetration of the antitrust violation, or that it had contemporaneous knowledge about the subsidiary's conduct. All the Commission has to do is to prove that the parent company has the ability to exercise decisive influence over the conduct of the subsidiary, and such influence or control was actually exercised. Such decisive influence may be established (i) where there is evidence that the parent company gives instruction to the subsidiary, and (ii) on the basis of a rebuttable presumption where the parent company holds 100% of the capital of the subsidiary, which has committed the antitrust violation.

### South Africa

The South African Competition Commission introduced the Guidelines for the Determination of Administrative Penalties for Prohibited Practices (the Guidelines) in April 2015. The Guidelines states that a holding company (parent company) may be held liable for an administrative penalty imposed on one of the holding company's subsidiaries. In determining whether the parent or holding company should be held liable, the Commission will consider whether the parent or holding company: (i) wholly owned the subsidiary; (ii) directly controls the subsidiary or has a decisive or material influence over the commercial policy of the subsidiary; (iii) had knowledge of the subsidiary's participation in the contravention; or (iv) derived substantial benefit from the activities of the subsidiary.

59. Substantial policy considerations arise for parental liability. First, as a means to deter anticompetitive conduct, parental liability allows competition authorities to target the entire corporate group and impose far higher fines. Further, by expanding the group of companies that can be liable for cartel activity, the competition authority can avoid difficulty in collecting any fine from an insolvent company.<sup>97</sup> Last, since the parent can be held liable leading to a higher fine, the parent is more willing to supervise the subsidiary strictly.

60. This parental liability doctrine has potentially substantial consequences on the way fines are calculated, notably due to (i) determination of maximum fining cap on a certain percentage of worldwide turnover; and (ii) establishment of recidivism. First, parental liability can increase the amount of the antitrust fine because the maximum cap based on turnover will be calculated on the basis of the combined turnover of the subsidiary and the parent company rather than that of the subsidiary alone. As a result, subsidiaries may be held liable for higher fines than the cap that would apply to them as an individual company. In addition, parental liability increases the risk of finding recidivism. Rules on a repeating offender apply to the economic unit, which may increase the risk that this aggravating circumstance will be applied.<sup>98</sup>

### Box 11. Recidivism in the context of parental liability in the EU

In *Michelin v Commission*, a subsidiary was found to be recidivist on account of a past infringement by another subsidiary of the same group, although the parent company had not been an addressee of the older EC decision.

In 2008, the European Commission (EC) issued a decision that Eni SpA (Eni) had participated in a cartel on the candle waxes market. In that decision, the EC noted that two of Eni's subsidiaries (Anic SpA and Enichem SpA) had been addressees of EC decisions for cartels. As a result, the EC considered that ENI was deemed to be a recidivist.

In *Eni SpA v Commission*, the ECJ rejected the aggravating circumstance in relation to Eni as the court held that the decision "clearly contains no reasoning enabling Eni to defend itself and the EU judicature to carry out its review."<sup>99</sup> ECJ ruled that in order to establish a repeated infringement on the part of a parent company, the parent company is able to defend itself "at the time when the repeated infringement is alleged against it." The statement of objections to the parent company must show that "that legal person formed, at the time of the first infringement, a single undertaking with the company found to have committed the first infringement."<sup>100</sup> In this regard, the court ruled that "it is for the commission to prove that the legal person concerned by the second infringement already exercised, at the time of the first infringement, a decisive influence over the subsidiary involved in the first infringement."<sup>101</sup>

## 5.2 *Calculating fines involving vertically-integrated undertakings and foreign sales*

61. In the cartels involving vertically integrated multinational companies, new questions of how to calculate a fine for competition law infringements have emerged.

62. One of the questions is the jurisdiction's treatment of captive sales in the process of determining fines. Captive sales (internal sales) concern sales of products between entities within the same undertaking typically for incorporation into finished products. Captive sales are common in sectors where vertical integration is sought by companies as a way to secure a constant supply of a key component, thus increasing the overall efficiency and reducing costs all throughout the supply chain. These can be distinguished from external sales, which are sales to independent third parties.

63. Taking the captive sales into account when calculating fines can lead to much higher fines. The ECJ reached the conclusion that sales between entities belonging to the same undertaking (captive sales or internal sales) must be taken into account on the same basis as sales to independent third parties (external sales) when calculating the fine.<sup>102</sup> The ECJ also pointed out that ignoring the captive sales would allow a vertically integrated undertaking to avoid a fine that is proportionate to the undertaking's importance on the product market to which the infringement relates.<sup>103</sup> Consequently, The ECJ held that vertically integrated undertakings may benefit from horizontal price-fixing agreements by (i) passing on the price increases in the inputs as a result of the infringement in the price of the processed goods, or (ii) not passing on those price increases, which in turn effectively grants them a cost advantage in relation to their competitors which obtain those same inputs on the market for the goods which are the subject of the infringement.<sup>104</sup>

64. Recently, another issue arose in the context of setting the fine for vertically integrated multinational companies.<sup>105</sup> The ECJ issued an important judgment that, for the purposes of cartel fine calculation, the European Commission may take into account non-EEA sales of cartelised inputs if these inputs have been built into finished products and subsequently sold to a third party in the EEA by a vertically integrated company.

### **Box 12. Fine calculation for vertically integrated multinational companies in the EU**

In the LCD panels cartel, the European Commission categorised the sales made by the cartel participants in order to establish the value of each undertaking's sales:

- Direct the European Economic Area (the EEA) sales- sales of cartelised LCD panels to independent third parties within the EEA;
- Direct EEA sales through transformed products- sales of cartelised LCD panels to an entity within the group to which the cartel participant belonged, which incorporated them into finished products that were subsequently sold to independent third parties within the EEA; and
- Indirect sales- sales of cartelised LCD panels to independent third parties situated outside the EEA, which then incorporated the panels into finished products (e.g., TVs) subsequently sold within the EEA.

In 2010, the Commission imposed a fine of EUR 300 million on InnoLux Corp. (InnoLux), manufacturer of liquid crystal display (LCD) panels, because of participating in a cartel from 2001 until 2006. InnoLux sold some of LCD panels to its subsidiaries in Asia. The subsidiaries situated outside the EEA then incorporated these LCD panels into finished products (TVs and IT products). The finished products were ultimately sold in the EEA to third party companies. InnoLux brought an appeal the Commission's decision before the EU General Court which reduced the fine to EUR 288 million. InnoLux appealed the ruling to the ECJ. InnoLux argued that the General Court included in the value of sales taken into account in calculating the fine finished products sold in the EEA into which its subsidiaries outside the EEA had incorporated the LCD panels. InnoLux underlined that the sales on the market for finished products did not relate to the cartel organised on the market for LCD panels.

The ECJ dismissed Innolux's appeal in its entirety in 2015. The ECJ found that the Commission was entitled to include, for the purpose of calculating the fine, the sales of finished products in the EEA up to the value of the cartelised parts. The ECJ rejected Innolux's argument that including its sales of finished products in the EEA, in calculating the fine, when those products incorporate LCD panels which were the subject of internal sales outside the EEA, exceeds the Commission's territorial jurisdiction.

65. The implication of this decision is that addressees of decisions that are foreign vertically integrated undertakings, usually international cartel participants, are potentially more exposed to very high fines because the undertakings will be fined based on their direct sales within the EEA as well as its direct sales through transformed products.<sup>106</sup>

66. As more authorities become more active in enforcement regarding international cartels, it may lead to possibly significant parallel sanctions. In the context of setting fines, the possibility of undertakings being fined twice for the same conduct is particularly likely to arise when indirect sales are taken into consideration, because such sales may also have been taken into account by other jurisdictions as direct sales in their respective jurisdiction.<sup>107</sup> Therefore, there appears to be need for jurisdictions to take each other's sanctions into account, while determining an adequate fine to ensure appropriate deterrence.

### 5.3 *Suspensory effect of judicial scrutiny*

67. Due process and fair decisions are essential for any successful competition law system. It is universally agreed that judicial scrutiny<sup>108</sup> of competition law decisions plays a pivotal role of any competition regime. Judicial scrutiny has basically an error-correction function. Further, it would ensure procedural fairness by protecting the rights of the parties.

68. Judicial scrutiny may prevent competition authorities from taking an action, when it can be judged controversial, because of the burden of being rejected by judges. On the other hand, judicial scrutiny can create a strong incentive for competition authorities to perform their task diligently. The threat of a decision being overturned in court should motivate competition authorities to make decisions according to sound economic and legal assessment. Accordingly, this will lead to a higher quality of competition law decisions over time, which will also help build a positive reputation of the competition authority. It is especially crucial considering that fines imposed on the context of competition law infringements are generally of a higher level than those imposed in the context of other regulations.

69. The judicial scrutiny of competition law decisions may take various forms and different scopes in many competition law systems. There are various reasons provided by courts to alter the amount of fines imposed by competition authorities: failure to prove a legal violation; incorrect calculation of the fine due to incorrect duration; unwarranted application of aggravating circumstances or insufficient consideration of mitigating circumstances; incorrect attribution of liability to a parent; and procedural errors.

70. In some jurisdictions, during the judicial review, the application of the decision under appeal is suspended until the review of the decision is complete.<sup>109</sup> In this case, deterrent effect of fines could be weakened especially where appeals courts are slow to act. However, some jurisdictions take a measure to maintain deterrence of fines when a competition authority's decision is suspended pending an appeal.<sup>110</sup>

**Box 13. Suspensory effect of judicial scrutiny in selected jurisdictions**

- In Brazil, a suspension of the payment of fine under judicial review requires that the fined company block the entire amount of the fine in a specific bank account.
- In Colombia, a company required to pay a fine may post a bond, before the courts, to guarantee payment of the fine and, if the bond is accepted, will not be obligated to pay until the judicial review is complete. The company, however, should pay interest which will accrue from the date of issuance of the decision by the Superintendent to the date on which payment takes place.
- In Former Yugoslav Republic of Macedonia, the payment of the fine can be suspended when the company challenges decision of the Commission for Protection of Competition.
- In Hong Kong, China, an appeal against the imposition, or the amount, of a pecuniary penalty, has suspensory effect on the decision, determination or order to which the appeal relates.
- In India, there is no specific provision in the Competition Act. However, the Competition Appellate Tribunal (COMPAT), in practice, orders the companies to pay between 10-25% of the total fine imposed by CCI (sometimes, the entire amount of the fine), before hearing the appeal. These decisions of COMPAT are not specifically based on the Competition Act. However, until this practice is thrown out by appellate courts, payment of penalties as a condition for COMPAT to hear the appeal would continue. Such payments have been required in the form of fixed deposits or bank guarantees as directed by COMPAT.
- In Russia, the Code of Administrative Offences of the Russian Federation (CoAO RF) stipulates that an administrative decision can be appealed before the expiration of the ten day term, and its execution is suspended until the decision of the Arbitration Court comes into force.
- In Singapore, under section 71(2) of the Competition Act, an appeal suspends any direction with respect to the payment, or amount, of the financial penalty imposed. However, an appeal does not suspend any other directions made by the CCS.
- In Switzerland, the application of the decision is suspended pending appeal at the Federal Administrative Tribunal stage. The decisions of the Federal Administrative Tribunal on competition matters may be appealed to the Federal Tribunal, Switzerland's Supreme Court. Appeals to the Administrative Tribunal do not have a suspensory effect.
- In the UK, an appeal against the imposition, or the amount of any penalty, will suspend the effect of the penalty imposed until the appeal is determined.

#### **5.4 Collection of fines**

71. Obtaining compliance with competition agency decisions is crucial to agency effectiveness and credibility. In this regard, collection of fines would be as important as imposition of fines. Imposition of fines will not deter anticompetitive activities unless the fines are actually collected. However, some competition authorities are having difficulty collecting the fines that they did impose, which may be common in young competition authorities. For instance, in El Salvador, the agency imposed fines amounting to USD 6.1 million, but only 1.03% of the imposed fines (USD 62 637.39) had been collected according to an ICN questionnaire in 2008-09.<sup>111</sup>

72. There could be several reasons why collecting fines is difficult. First, many decisions have been challenged and appeals courts are slow to act while suspension of execution has been issued. Non-payment or overdue payment seems to be usual in some jurisdictions where appeals to the decisions on fines have become an easy and routine tool in the hands of companies to prevent or delay enforcement.<sup>112</sup> For instance, in 2014, the Chairperson of the Competition Commission of India pointed out that delayed payment by firms had reduced the collection of fines by the Commission to less than one-tenth of the amount of fines imposed due to slow appeal procedure.<sup>113</sup>

73. Second, companies may avoid the payment of fines through liquidation with subsequent formation of different economic entities. For example, in Ukraine, the amount of fines imposed between 2007 and 2012 amounted to UAH 1200 million (EUR 115.9 m) while the amount of fines collected was UAH 125.5 million (EUR 12.6 m). One of the reasons is that a company can avoid collecting fines by liquidating itself and reregister itself as a different legal entity.<sup>114</sup>

74. Third, successful collection of fines can be difficult because the competition authorities do not collect antitrust fines. For example, although the Turkish competition authority imposes fines, they are collected by the relevant regional units of the Ministry of Finance.<sup>115</sup> Competition authorities have made efforts to ensure the payments of fines. In Colombia, there is a special division within the competition authority that has jurisdictional power to force companies to pay the fine.<sup>116</sup>

### **5.5 Imposition of fines on trade association**

75. In some jurisdictions, trade associations providing cover for cartels. Further, in some jurisdictions, trade associations were tasked with performing regulatory or administrative duties, therefore playing a quasi-governmental role as a bridge connecting the government and the business, in addition to promoting common interest for the industry, the original purpose of a trade association. Given their functions, business associations have an incentive to restrict member enterprises' business activities.

76. These days, competition authorities show a more aggressive approach to the enforcement of competition law against trade associations and their members as below.

#### **Box 14. Competition law enforcement against trade association in selected jurisdictions**

- In 2014, Chile's Court of Defense of Free Competition (TDLC) ordered the poultry companies and the Poultry Producers Trade Association (APA) to pay fines totalling approximately USD 58 million for adopting a quota system that limited available supply for the chicken meat market. Maximum legal fines were imposed on Agrosuper and Ariztia (USD 23.3 million each approximately) and Don Pollo was ordered to pay about USD 9.3 million. Also, TDLC set a fine of USD 1.6 million to APA. In addition, for the first time since its inception, TDLC ordered the dissolution of a trade association, which was formed by these companies because the trade association played an important role in the coordination and promotion of the agreement.
- The Competition Commission of India (CCI) imposed the maximum penalty of INR 1 424 521, being 10% of the average turnover, on the All India Motor Transport Congress (AIMTC), the trade association for road transport service providers in 2015. CCI found that AIMTC had called for a 15% increase in freight charges following an announcement of diesel price increases by state run oil marketing companies.
- The UK Competition and Markets Authority (CMA) fined an association of estate and lettings agents and 3 of its members in 2015. The trade association and three of its members allegedly formed a cartel using an association's membership rules, resulting in fines totaling over GBP 775 000. CMA only levied a fine of GBP 100 on the trade association due to its low turnover and limited funds.

77. However, competition authorities may be confronted with several challenges when they calculate and impose fines on business associations,<sup>117</sup> possibly leading to an insufficient deterrent effect in terms of not only specific deterrence but also general deterrence.

78. A first challenge concerns the relevant turnover which is generally a basis for calculating the amount of fine. If the turnover refers to membership fees, antitrust fines would be insufficient for deterrence because the turnover is very small. Further, antitrust fine based on the turnover would have nothing to do with the impact on the relevant market of anticompetitive activities.

79. A second challenge relates to how to collect antitrust fines on business associations. Business associations have not only small turnover but also limited assets. As a result, if antitrust fines are imposed on the associations, they may not have the ability to pay the antitrust fines. They may avoid antitrust fines by dissolving themselves and forming a new association as a different legal entity. It led competition authorities such as the European Commission to introducing a provision where if a fine is levied on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association has the obligation to call for contributions from its members to pay the amount of the fine.<sup>118</sup>

## **6. Alternatives to fines**

### **6.1 *Imposition of sanctions on individuals***

80. A number of jurisdictions impose either administrative or criminal sanctions on individuals involved in anticompetitive conduct. Individual sanctions can be important element in enforcing competition laws. The Competition Committee's Second Cartel Report<sup>119</sup> recommended that member countries consider (i) introducing and imposing sanctions against natural persons; and (ii) introducing criminal sanctions in cartel cases where it would be consistent with social and legal norms.

81. There are several arguments in favour of imposing sanctions on individuals. First, corporate fines are necessary but not sufficient to achieve optimal deterrence of anticompetitive conduct. Ginsburg and Wright pointed out that raising the fines to the optimal deterrence levels would be unsuitable because it may introduce unintended spill-over effects by imposing costs upon consumers in the form of higher prices.<sup>120</sup> In addition, Wils acknowledges that high fines might conflict with the legal principle of proportionality<sup>121</sup> and thus they might be cancelled or reduced after a judicial review.

82. Second, positioning corporate fines as the only sanctions against anticompetitive conduct has the weakness of treating corporations as solely responsible for competition law infringements. In this regard, Ginsburg and Wright made a proposal which enhances deterrence of hard-core cartels by shifting sanctions away from corporations towards the individuals responsible for the violation.<sup>122</sup> They focused on the optimal mix of sanctions allocated between corporations and individuals involved in cartels. Third, under a penalty regime based purely on corporate fines, corporations may lack the tools to effectively control their managers.<sup>123</sup> Executives can manage the company by operating cartels with low effort or competing with high effort. Although shareholders prefer the latter, they can only imperfectly monitor effort and so executives may choose the former. The lack of alignment in owners' and managers' incentives implies that sanctions targeting the owners or shareholders may be ineffective.

### **6.2 *Criminal sanctions***

83. Criminal sanctions against individuals involved in infringements of competition law have been adopted by many jurisdictions around the world. They vary from pecuniary fines to imprisonment. A tenet of criminalisation is shifting sanctions away from corporations and toward the individuals who engage in anticompetitive conduct such as price-fixing.<sup>124</sup> The threat of sanctions against individuals could be a more effective deterrent than the threat of corporate sanctions. As W. Kolasky said, "nothing catches a corporate executive's attention as effectively as the threat that she might have to serve jail time."<sup>125</sup> Another argument in favour of criminal sanctions would be that cartels such as price fixing and bid rigging are inherently harmful and thus comparable to crimes such as the theft or fraud. The former Assistant Attorney General J. Klein highlighted "cartels are the equivalent of theft by well-dressed thieves and they deserve unequivocal public condemnation".<sup>126</sup> From this point of view, cartels are considered morally reprehensible. Moreover, criminal sanctions educate the public about harm of anticompetitive conduct as well as create deterrence.<sup>127</sup> Criminal sanctions such as imprisonment make greater headlines in the media and thus promote awareness of cartels and competition law.

84. Imprisonment can be considered as the most expressive sanction therefore it carries a “uniquely strong moral message.”<sup>128</sup> For example, the OFT (the CMA’s predecessor) concluded imprisonment may be a necessary instrument for optimal deterrence after assessing the deterrent power of several penalties regimes.<sup>129</sup> Likewise, W. Kolasky pointed out that the first lesson from criminal antitrust enforcement in the US is that criminal sanctions for individuals such as jail time are absolutely critical for effective enforcement and deterrence.<sup>130</sup>

85. A number of jurisdictions around the world include criminal sanctions. The US has long advocated criminal sanctions and therefore often sends individuals to prison for cartel activity. More than 20 jurisdictions now have criminal cartel offences, while others include specific offences against bid rigging.<sup>131</sup> Currently, one can find a double tendency of decriminalization and criminalization, looking at competition law enforcement in jurisdictions. In 2016, Chile has introduced criminal sanctions for cartel after considering whether to criminalize cartel conduct.<sup>132</sup> By contrast, Indonesia considered but ultimately rejected criminal sanctions in competition law in 2015. Indonesia’s competition authority concluded that criminal sanctions may not be the best solution to deter anticompetitive practices because of the lack of awareness about the competition law by small and medium business owners. In 2015, the New Zealand government also dropped the plan to criminalize cartel conduct because it would have a chilling effect on pro-competitive behaviour.

86. Although a broad range of jurisdictions have now adopted criminal cartel offenses, it is well known that successful criminal enforcement has not proved widely used except in the US.<sup>133</sup> In practice, criminal sanctions are imposed on individuals relatively rarely in a number of jurisdictions. For example, in the UK, there have been criminal prosecutions in three cartel cases to date: the *Marine Hose Cartel*<sup>134</sup>, the *Fuel Surcharges Cartel*<sup>135</sup>, and the *Galvanised Steel Tank Cartel*.<sup>136</sup> In Ireland there have only been three cases against cartel conduct since 2002. In 2016, the ACCC brought the first criminal charge against a corporation under the criminal cartel provisions of the Competition and Consumer Act since Australia introduced a cartel offence in 2009.

87. In spite of the advantages of criminal sanctions in deterrence of cartels, there would appear to be several reasons why countries are reluctant to criminalize participation in cartels. First, a country might consider that criminal sanctions are not compatible with its values and social norms.<sup>137</sup> Social and cultural attitudes may be a big hurdle to criminal enforcement. Criminalization is associated with moral judgments that vary with socio-cultural context. The public might believe that cartels are not considered sufficiently reprehensible to justify criminal sanctions against individuals. For example, according to the Cartel Project survey<sup>138</sup> in Australia, less than a quarter of those surveyed support the view that individuals should be imprisoned for cartel conduct. Beaton-Wells explained that the survey disclosed the requisite conditions for deterrence, including knowledge of the law and sanction, are not met among business people in Australia, although the primary justification for criminal sanction would be deterrence of cartel conduct.<sup>139</sup> Second, it is very difficult to obtain sufficient evidence on cartelists in order to bring a successful criminal prosecution because the criminal standard of proof is much higher than a civil standard.<sup>140</sup> As criminal enforcement is more resource intensive and risky than administrative one, the competition authority may avoid treating cartels as a criminal offence by bringing administrative proceedings instead. Third, costs of criminal sanctions, and-in particular- imprisonment, could be expensive because the individuals are prohibited from contributing to the society and economy during the period of their punishment.<sup>141</sup> Even after the period of imprisonment, they may be deprived from contributing to their society due to the stigma of having a criminal record. The cost would be more significant in the case of experienced executives who used to work for leading companies in the high-tech field or a small economy where replacements are hard to find. Furthermore, the costs of wrongful convictions would be greater.<sup>142</sup> Convicting innocent individuals often occurs in many areas of criminal prosecution. Therefore individuals may avoid pro-competitive conduct such as forming a joint venture if they believe this could be mistaken for cartel activity.

### 6.3 *Disqualification*

88. While imprisonment is a strong deterrent for directors involved in cartel activity, other types of sanctions can be effective for anticompetitive conduct such as cartels. An alternative to criminal sanctions is director disqualification (hereinafter disqualification) as an antitrust sanction. Director disqualification provides a civil or administrative sanction against individuals involved in cartels but avoids the complexity and uncertainty of a criminal process. Disqualification is much less expensive to society than imprisonment. In addition, disqualification is gaining growing popularity in light of concerns that very high corporate fines do not achieve deterrence. Disqualification could be of particular importance in jurisdictions where there are no criminal sanctions.

89. There are many commentators who have argued in favour of introducing disqualification as a sanction for cartel participation. Ginsburg and Wright (2010) indicate that increasing corporate fines to resolve the under-deterrence problem is not a smart move and suggest disqualification as a sanction that complements the traditional antitrust sanctions for individual. Disqualification, like imprisonment, levies a “direct and substantial opportunity cost” on individuals. It constitutes an effective deterrent at a lower social cost because while there are inherent costs to society for imposing imprisonment, disqualification costs less. Another advantage, they argue, is potential reputational repercussions.<sup>143</sup> In the words of W. Wils, disqualification may not be an equally effective alternative to imprisonment, but it is a “defensible second best.”<sup>144</sup> A survey of UK corporations prepared for the OFT in 2010 found that the companies perceived disqualification as the second most powerful deterrent (behind criminal penalties) of competition law violations.<sup>145</sup>

90. Irrespective of its important advantages, disqualification is not immune from criticism.<sup>146</sup> First, the deterrent effect of disqualification is likely to depend on the age of the director.<sup>147</sup> If the directors are close to retirement, the company may choose to compensate its former directors through a generous severance package. Second, it has also been argued that a company could weaken the deterrent effect of disqualification by employing the director in another capacity.<sup>148</sup> Third, it can only be used against directors, not against employees who have been directly involved in cartel conduct. It may result in punishing only those distantly responsible for the infringements of their employees.<sup>149</sup> Fourth, the risk of disqualification may deter valuable professionals from undertaking the role of a director because they can be held liable for activities of the company that they ought to have been aware of, even if they had no knowledge of them.<sup>150</sup> However, it could be argued that those in charge of the company are required to supervise its activities and ensure that it obeys the rules.

91. This type of sanctions to individuals is relatively new in the enforcement of competition law among most jurisdictions but it has been observed that disqualification has been imposed effectively for many years to deter other types of illegal corporate activity. The UK was a frontrunner when it introduced the Company Directors Disqualification Act (CDDA) in 1986.

#### **Box 15. An overview of the UK system**

Director disqualification has a long history in the UK and was first introduced in 1928. The statute that governs the current system is the Company Directors Disqualification Act (CDDA) 1986 as amended by the Enterprise Act 2002.

Although Competition Disqualification Orders (CDOs) are basically a civil penalty, the competition authority does not have the authority to directly impose disqualifications on individuals. Under the CDDA, the court must make a CDO against a person if the court considers that the following two conditions are satisfied in relation to that person: (1) an undertaking which is a company of which that person is a director commits a breach of competition law, and (2) the court considers that person’s conduct as a director makes him or her unfit to be concerned in the management of a company. CDOs can be sought for not only cartels but also abuse of dominance.

A CDO can only be made against a director of a company. The OFT and Regulators consider that 'director' for these purposes includes a de facto director. 'Company' includes unregistered companies.

The maximum period of disqualification under a CDO is 15 years. During the period in which a person is subject to a CDO it is a criminal offence for him to act as a director of a company, act as a receiver of a company's property, or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, or act as an insolvency practitioner.

92. Disqualification is an antitrust sanction in a growing number of jurisdictions. The threat of being subjected to a disqualification order is intended to create an incentive for individuals not to engage in cartel conduct.

#### **Box 16. Recent developments in selected jurisdictions**

- In Australia, the ACCC may also apply to the Federal Court of Australia for disqualification from managing corporations against individuals involved in contraventions of part IV of the Act. In 2014, the Court disqualified three individuals including a managing director of a company from managing a corporation due to his involvement in cartel activity for 3 years.
- Hong Kong, China, Competition Ordinance took full effect in 2015. With the Competition Ordinance, individuals involved in breaches may be disqualified from acting as directors or being involved in the affairs of the company for up to 5 years if their conduct contributed to the company's infringement, or if they had reasonable grounds to suspect existence of the infringement and took no steps to prevent it, or if they did not know but should have known of the infringement.
- In Lithuania, the 2012 amendments introduced the antitrust liability of CEOs of firms having been found guilty of anticompetitive conduct. The Competition Council may apply to the Vilnius Regional Administrative Court for the disqualification of a former or current managing director in certain circumstances. In ruling on the case, the court is not bound by the proposal of the Competition Council regarding sanctions and their scope.<sup>151</sup> The period of disqualification is three to five years. During that time the managing director may not be a managing director of a public and/or private legal person, or to be a member of the collegial supervisory and/or management body of a public and/or private legal person.
- In Mexico, individuals involved in anticompetitive practices may face disqualification from acting as an adviser, administrator, director, manager, officer, executive, agent, representative or proxy at any company for up to five years.
- In Russia, the FAS may seek disqualification from occupying certain posts or carrying out certain activities for a period of up to three years. Such sanctions would be imposed by a court.<sup>152</sup>
- The 2008 Sweden's amended Competition Act introduced a new sanction of disqualification orders for cartel activity. The Swedish Competition Authority can make an application for a disqualification order for persons at CEO-level, and the courts are authorised to impose qualification orders on persons exercising legal or actual management of undertakings found to have initiated or participated in a cartel. However, persons who report a cartel to the Authority or fulfill the requirements for cooperation within the leniency programme will not be subject to a disqualification order.

#### 6.4 *Publication of findings of infringements*

93. One potential alternative to fines is to publicise findings of infringements in order to use reputational effects as a deterrent. Implementing this sanction will be cheaper and easier than other sanctions. Furthermore, it can have a significant deterrent effect on companies infringing competition law. The possible economic impact derived from the damage to reputation enhanced by publication of infringements may be larger than the damage resulting from the sanction. The economic impact may be particularly large when companies sell consumer goods rather than intermediate goods because consumers can be very sensitive to corporate reputation when they make purchase decisions. For example, if an online shopping mall is required to publish findings of its infringement through internet websites where consumers make their purchases, its sales may drop sharply because consumers hesitate to buy a product or move to other online shopping malls easily.

94. To this end, most competition authorities issue a press release when a company is found to have infringed competition law. Moreover, several authorities require companies to publish their infringements at their own expense. In Brazil, CADE requires the perpetrators to publish the extract from the conviction in newspapers at their own expense.<sup>153</sup> In most recent cartel cases, CADE has been primarily ordering companies to publish the decisions in a major newspaper. In France, the Competition Council may order the publication, broadcasting or posting of its decision or of an extract in the manner it defines. Also, it may order the inclusion of the decision or of the extract in the companies' own annual report. In these cases, the costs are borne by the companies.<sup>154</sup> In Korea, under Article 5 and 21 of the Monopoly Regulation and Free Trade Act (MRFTA), the KFTC may order the company infringing competition law to publish the fact that the company is ordered to correct such anticompetitive conduct. For example, in 2014, the KFTC imposed a corrective order on a national university for engaging in the bundling practice of forcing campus dormitory residents to purchase meal coupons. Also, the KFTC issued a publication order in the place of business to prevent recurrence.

#### 6.5 *Debarment against bid rigging*

95. Competition authorities consider bid rigging as one of the forms of anticompetitive conduct. Bid rigging can be particularly harmful if it occurs in public procurement.<sup>155</sup> Debarment from future bidding opportunities or disqualification (hereinafter debarment), especially in public procurement, may be an effective form of sanction where the deterrent effect on bid riggers is commensurate with the severity of the offense. Regulations on debarment vary from country to country. They are generally a matter of public procurement law and/or criminal law rather than competition law. In a number of jurisdictions, competition authorities are allowed to take advantage of debarment sanctions that originally were intended for other purposes in order to enforce competition law. Such debarment can be considered as a greater deterrent than antitrust fines since it can have a significantly adverse impact on the turnover of and long-term success of companies. Recent developments in several jurisdictions are briefly summarised as below.

##### **Box 17. Debarment systems in selected jurisdictions**

- In Brazil, According to Article 24 of Law No. 8,884/94, besides fines, companies may be condemned as ineligible for official financing or participation in bidding processes involving purchases, sales, works, services or utility concessions with the federal, state, municipal and Federal District authorities and related entities, for a period equal to or exceeding five years. In 2014 CADE detected three bid-rigging cases. These were in the markets for metal detector security doors; orthopaedic orthotics and prosthesis products; and painting and plumbing materials. In all such cases, the companies were debarred from public procurement for a five-year period.

- The new Hungarian Public Procurement Act (PPA) came into force in 2015. Under the new PPA, companies are subject to debarment as a result of competition law infringements in the following ways: (i) a company will face a three-year long automatic disqualification if fined by competition authorities for any type of restrictive agreement; and (ii) an automatic disqualification is imposed for a longer, up to five-year period, if the directors, board members, other employees with powers of representation, or the sole shareholder of a company has been convicted by criminal courts for bid rigging in public procurement.
- In Korea, Article 76.1.(3) of the Enforcement Decree of the Act on Contracts to Which the State is a Party stipulates that Public Procurement Service shall prevent a company violating the Monopoly Regulation and Free Trade Act (MRFTA) from bidding for government construction contracts for a period it sets of one month or longer but not exceeding two years upon KFTC request. In 2014, the KFTC found that twenty one construction companies colluded in relation to tenders for the construction of the Incheon subway line No.2 in Korea. Public Procurement Service decided to prohibit companies involved in the bid rigging from participating in bidding for government construction contracts from 6 months to 2 years after the KFTC reported the decision to the Public Procurement Service.
- In Peru, Article 237 of the Regulations of the State Procurement Law enables the State Procurement Court to impose additional sanctions on providers, participants, bidders and contractors if they participate in practices that restrict competition, including the following: (a) temporary prohibition to participate in State procurement processes, which cannot be less than six months nor more than three years; and (b) permanent prohibition to participate in the State procurement processes.

96. Although proponents of debarment may argue that debarment is an effective sanction to achieve specific and general deterrence, there are several obstacles to the efficacy of debarment. The first is how leniency programme work with debarment. Despite the coordination between competition authorities and relevant agencies, leniency programme may not provide any protection to leniency applicants with respect to debarment rules. If competition authorities want leniency programmes to remain effective tools for detecting competition law infringements, it is important to ensure that the possibility of debarment does not deter companies from self-reporting cartel activity to the competition agency with information on cartel activity. However, although competition authorities are confident of the benefits of leniency programmes, preventing administrative agencies such as procurement agencies from applying debarment rules to leniency applicants may be challenging.<sup>156</sup>

97. Second, debarment (especially automatic debarment) raises risks for bid rigging in markets where there are already few potential suppliers. Particularly in smaller economies, this sanction may backfire by decreasing the number of qualified bidders to an uncompetitive level. This is especially true if all companies engaged in the bid rigging are debarred from the future government contracts. Auriol and Soreide suggest that a better option would be to debar the company that has benefited from the collusion and allow the other cartelists to participate in the future bidding.<sup>157</sup> Further, to avoid the shortcomings, it could be argued that debarment can be imposed on the individuals involved in bid riggings and not their company. Debarment of individuals reduces incentives to get involved in bid riggings while it allows the company to continue to participate in future bidding in procurement.<sup>158</sup>

98. Third, the duration of debarment and the market to which it applies can be difficult to determine. The length of debarment period and the market to which it applies should be commensurate with the seriousness of the infringements because eliminating a competitor means reduced competition. This in turn may lead to higher prices or lower quality, a counter-productive result which is quite the opposite of what the debarment instrument is intended to deliver.

## 7. Conclusion

99. Identifying appropriate sanctions for competition law infringements is a challenge. There is an ongoing debate among antitrust enforcers and academics about appropriate level of fines and other sanctions necessary in order to achieve objectives such as deterrence. Although the design of optimal penalties regimes depends on the economic and political circumstances in a jurisdiction and the institutional capabilities of the authorities in charge of enforcing competition law, the overview provided by this Note may provide useful insights in setting antitrust fines and other sanctions for competition law infringements.

100. This Note has reviewed both antitrust fines that courts and competition authorities impose in antitrust cases and other various sanctions they use to achieve their objectives. It has summarised the strengths and weaknesses of the sanctions that authorities have at their disposal, highlighting some of the theoretical issues but focusing on practical concerns faced by jurisdictions. As noted earlier the development of competition law enforcement around the world has been remarkable. There are a number of common features in the fundamental aspects of competition law regime. At the same time, there still are divergences in imposition of antitrust sanctions followed by different agencies around the world.

101. Despite the divergences, it is widely accepted that adoption and publication of a method of setting fines such as guidelines in antitrust cases brings positive effects in several ways. The guidelines deter undertakings from anticompetitive conduct if they realise that the expected costs of engaging in the conduct exceed the potential gains. 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. Finally, 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.

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## ANNEX

## INFORMATION ON ANTITRUST SANCTIONS IN COMPETITION AUTHORITIES

Jurisdiction	Sources of Information
AUSTRALIA	<p>GTDT – Cartel Regulation 2016 (Australia):  <a href="https://gettingthedealthrough.com/area/5/jurisdiction/5/cartel-regulation-australia/">https://gettingthedealthrough.com/area/5/jurisdiction/5/cartel-regulation-australia/</a></p> <p>GTDT – Dominance 2016 (Australia):  <a href="https://gettingthedealthrough.com/area/10/jurisdiction/5/dominance-australia/">https://gettingthedealthrough.com/area/10/jurisdiction/5/dominance-australia/</a></p> <p>GCR – The Asia Pacific Antitrust Review 2015 (Australia: Overview):  <a href="http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2732/australia-overview/">http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2732/australia-overview/</a></p>
BELGIUM	<p>GTDT – Dominance 2016 (Belgium):  <a href="https://gettingthedealthrough.com/area/10/jurisdiction/31/dominance-belgium/">https://gettingthedealthrough.com/area/10/jurisdiction/31/dominance-belgium/</a></p> <p>GCR - The European Antitrust Review 2016 (Belgium: Overview):  <a href="http://globalcompetitionreview.com/reviews/72/sections/241/chapters/2904/belgium-overview/">http://globalcompetitionreview.com/reviews/72/sections/241/chapters/2904/belgium-overview/</a></p>
BRAZIL	<p>GCR - The Antitrust Review of the Americas 2016 (Brazil: Cartels):  <a href="http://globalcompetitionreview.com/reviews/74/sections/277/chapters/2999/brazil-cartels/">http://globalcompetitionreview.com/reviews/74/sections/277/chapters/2999/brazil-cartels/</a></p> <p>Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional :  <a href="http://www.ibrac.org.br/Downloads/Overview_of_Competition_Law_in_Brazil.pdf">http://www.ibrac.org.br/Downloads/Overview_of_Competition_Law_in_Brazil.pdf</a></p> <p>LAW Nº 12.529 OF NOVEMBER 30, 2011:  <a href="http://www.oabsp.org.br/comissoes2010/regulacao-economica/legislacao/LAW%20No%2012529%202011%20-English%20version%20from%2018%2005%202012.pdf/download">http://www.oabsp.org.br/comissoes2010/regulacao-economica/legislacao/LAW%20No%2012529%202011%20-English%20version%20from%2018%2005%202012.pdf/download</a></p> <p><a href="#">OECD Annual Report on Competition Policy Developments in Brazil (2010)</a>:  <a href="http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2011)18&amp;docLanguage=En">http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2011)18&amp;docLanguage=En</a></p>
CANADA	<p>GCR Know-How: Antimonopoly &amp; Unilateral Conduct :  <a href="http://globalcompetitionreview.com/know-how/topics/87/antimonopoly-unilateral-conduct/">http://globalcompetitionreview.com/know-how/topics/87/antimonopoly-unilateral-conduct/</a></p> <p>GCR –The Antitrust Review of the Americas 2016 (Canada: Competition Bureau):  <a href="http://globalcompetitionreview.com/reviews/74/sections/276/chapters/2992/canada-competition-bureau/">http://globalcompetitionreview.com/reviews/74/sections/276/chapters/2992/canada-competition-bureau/</a></p> <p>International Comparative Legal Guides (ICLG), Cartel &amp; Leniency 2016 (Canada)  <a href="https://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2016/canada">https://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2016/canada</a>  <a href="#">Competition Act</a>:  <a href="http://www.laws.justice.gc.ca/eng/acts/C-34/index.html">http://www.laws.justice.gc.ca/eng/acts/C-34/index.html</a></p>
CHILE	<p>Latin American Competition Forum 2013 Session I: Criteria for Setting Fines for Competition Law Infringements Contribution from Chile:  <a href="http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2013)13&amp;docLanguage=En">http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2013)13&amp;docLanguage=En</a></p> <p>GCR – The Antitrust Review of the Americas 2016 (Chile):  <a href="http://globalcompetitionreview.com/reviews/74/sections/278/chapters/3001/chile-national-economic-prosecutors-office/">http://globalcompetitionreview.com/reviews/74/sections/278/chapters/3001/chile-national-economic-prosecutors-office/</a></p> <p>Accession Report on Competition Law and Policy (2010):  <a href="http://www.oecd.org/chile/47950954.pdf">http://www.oecd.org/chile/47950954.pdf</a></p> <p>GTDT – Cartel Regulations 2010 (Chile):  <a href="http://www.carey.cl/download/noticias/cartel_regulation_2010.pdf">http://www.carey.cl/download/noticias/cartel_regulation_2010.pdf</a></p>
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SINGAPORE	CCS Guidelines on the Appropriate Amount of Penalty: <a href="https://www.ccs.gov.sg/legislation/~/_media/custom/ccs/files/legislation/ccs%20guidelines/ccsguidelinepenalty20071033.ashx">https://www.ccs.gov.sg/legislation/~/_media/custom/ccs/files/legislation/ccs%20guidelines/ccsguidelinepenalty20071033.ashx</a> International Comparative Legal Guides (ICLG), Cartel & Leniency 2016 (Singapore): <a href="https://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2016/singapore">https://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2016/singapore</a>
SLOVAK REPUBLIC	GCR - The European Antitrust Review 2016 (Slovakia: Overview): <a href="http://globalcompetitionreview.com/reviews/72/sections/264/chapters/2947/slovakia-overview/">http://globalcompetitionreview.com/reviews/72/sections/264/chapters/2947/slovakia-overview/</a>
SLOVENIA	GCR - The European Antitrust Review 2016 (Slovenia: Overview): <a href="http://globalcompetitionreview.com/reviews/72/sections/265/chapters/2948/slovenia-overview/">http://globalcompetitionreview.com/reviews/72/sections/265/chapters/2948/slovenia-overview/</a>

SOUTH AFRICA	<p>GCR - The African and Middle Eastern Antitrust Review 2016 (South Africa: Cartels):  <a href="http://globalcompetitionreview.com/reviews/77/sections/290/chapters/3140/south-africa-cartels/">http://globalcompetitionreview.com/reviews/77/sections/290/chapters/3140/south-africa-cartels/</a>  Guidelines for the Determination of Administrative Penalties for Prohibited Practices:  <a href="https://africanantitrust.files.wordpress.com/2015/04/sa-guidelines-for-administrative-penalties.pdf">https://africanantitrust.files.wordpress.com/2015/04/sa-guidelines-for-administrative-penalties.pdf</a>  Media Release (Monday, 22 August 2016), Arcelormittal to pay R1.5 billion fine for its involvement in cartels:  <a href="http://www.compcom.co.za/wp-content/uploads/2016/01/Press-release-ArcelorMittal-final-1.pdf">http://www.compcom.co.za/wp-content/uploads/2016/01/Press-release-ArcelorMittal-final-1.pdf</a></p>
SPAIN	<p>GTDT – Dominance 2016 (Spain):  <a href="https://gettingthedealthrough.com/area/10/jurisdiction/21/dominance-spain/">https://gettingthedealthrough.com/area/10/jurisdiction/21/dominance-spain/</a>  GTDT – Cartel Regulation 2016 (Spain):  <a href="https://gettingthedealthrough.com/area/5/jurisdiction/21/cartel-regulation-spain/">https://gettingthedealthrough.com/area/5/jurisdiction/21/cartel-regulation-spain/</a></p>
SWEDEN	<p>GCR - The European Antitrust Review 2016 (Sweden: Competition Authority):  <a href="http://globalcompetitionreview.com/reviews/72/sections/267/chapters/2951/sweden-competition-authority/">http://globalcompetitionreview.com/reviews/72/sections/267/chapters/2951/sweden-competition-authority/</a></p>
SWITZERLAND	<p>GTDT – Dominance 2016 (Switzerland):  <a href="https://gettingthedealthrough.com/area/10/jurisdiction/29/dominance-switzerland/">https://gettingthedealthrough.com/area/10/jurisdiction/29/dominance-switzerland/</a>  GCR - The European Antitrust Review 2016 (Switzerland: Overview):  <a href="http://globalcompetitionreview.com/reviews/72/sections/265/chapters/2948/slovenia-overview/">http://globalcompetitionreview.com/reviews/72/sections/265/chapters/2948/slovenia-overview/</a>  International Comparative Legal Guides (ICLG), Cartel &amp; Leniency 2016 (Switzerland):  <a href="https://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2016/switzerland">https://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2016/switzerland</a></p>
CHINESE TAIPEI	<p>Annual Report on Competition Policy Developments in Chinese Taipei:  <a href="http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2015)33&amp;docLanguage=En">http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2015)33&amp;docLanguage=En</a>  Fair Trade Act of 2011:  <a href="http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=655&amp;docid=12106">http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=655&amp;docid=12106</a></p>
TURKEY	<p>GTDT – Dominance 2016 (Turkey):  <a href="https://gettingthedealthrough.com/area/10/jurisdiction/54/dominance-turkey/">https://gettingthedealthrough.com/area/10/jurisdiction/54/dominance-turkey/</a>  GCR Know-How: Antimonopoly &amp; Unilateral Conduct :  <a href="http://globalcompetitionreview.com/know-how/topics/87/antimonopoly-unilateral-conduct/">http://globalcompetitionreview.com/know-how/topics/87/antimonopoly-unilateral-conduct/</a>  Regulation on Fines:  <a href="http://www.rekabet.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FRegulation%2Fyonetmelik11.pdf">http://www.rekabet.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FRegulation%2Fyonetmelik11.pdf</a></p>
UKRAINE	<p>GCR Know-How: Antimonopoly &amp; Unilateral Conduct:  <a href="http://globalcompetitionreview.com/know-how/topics/87/antimonopoly-unilateral-conduct/">http://globalcompetitionreview.com/know-how/topics/87/antimonopoly-unilateral-conduct/</a>  UNCTAD's Voluntary Peer Review Of Competition Law and Policy: Ukraine (2013)  <a href="http://unctad.org/en/PublicationsLibrary/ditclp2013d3_overview_en.pdf">http://unctad.org/en/PublicationsLibrary/ditclp2013d3_overview_en.pdf</a></p>
UNITED KINGDOM	<p>GTDT – Dominance 2016 (United Kingdoms):  <a href="https://gettingthedealthrough.com/area/10/jurisdiction/22/dominance-united-/">https://gettingthedealthrough.com/area/10/jurisdiction/22/dominance-united-/</a>  Cartels &amp; Leniency 2016 (United Kingdoms)  <a href="http://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2016/united-kingdom">http://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2016/united-kingdom</a>  OFT's guidance as to the appropriate amount of a penalty:  <a href="https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf">https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf</a>  Office of Fair Trading, An Assessment of Discretionary Penalties Regimes:  <a href="http://londoneconomics.co.uk/wp-content/uploads/2011/09/30-An-assessment-of-the-UK-Discretionary-Penalties-Regime.pdf">http://londoneconomics.co.uk/wp-content/uploads/2011/09/30-An-assessment-of-the-UK-Discretionary-Penalties-Regime.pdf</a>  The deterrent effect of competition enforcement by the OFT:  <a href="http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf">http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf</a>  Competition disqualifications orders: OFT510  <a href="https://www.gov.uk/government/publications/competition-disqualification-orders">https://www.gov.uk/government/publications/competition-disqualification-orders</a>  GTDT – Cartel Regulations 2016 (United Kingdoms):  <a href="https://gettingthedealthrough.com/area/5/jurisdiction/22/cartel-regulation-united-kingdom/">https://gettingthedealthrough.com/area/5/jurisdiction/22/cartel-regulation-united-kingdom/</a></p>

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UNITED STATES	GTDT – Dominance 2016 (United States): <a href="https://gettingthedealthrough.com/area/10/jurisdiction/23/dominance-united-states/">https://gettingthedealthrough.com/area/10/jurisdiction/23/dominance-united-states/</a> Chapter Eight Fine Primer: Determining the Appropriate Fine Under the Organizational Guidelines (March 2013) <a href="http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Organizational_Fines.pdf">http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Organizational_Fines.pdf</a> GTDT – Cartel Regulation 2016 (United States): <a href="https://gettingthedealthrough.com/area/5/jurisdiction/23/cartel-regulation-united-states/">https://gettingthedealthrough.com/area/5/jurisdiction/23/cartel-regulation-united-states/</a>
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## END NOTES

- <sup>1</sup> Fines refer to as sanctions on the merits of the case, not for procedural breaches.
- <sup>2</sup> “Abuse of dominance” refers here to as a shorthand term that is meant to include all of the standards that govern unilateral conduct in jurisdictions’ competition laws.
- <sup>3</sup> In the US, competition authorities do not impose fines for civil violations of antitrust laws including unilateral conduct violations. Actually, as a matter of policy, unilateral conduct is never considered as suitable for sanctions by the authorities because too much case-by-case judgment and ex post assessment are required to decide whether the conduct was illegal in the first place. See OECD (2006), Roundtable on Remedies and Sanctions in Abuse of Dominant Cases, DAF/COMP(2006)13.
- <sup>4</sup> See Alberto Heimler and Kirtikumar Mehta (2014), *Monopolization in Developing Countries*, The Oxford Handbook of International Antitrust Economics. 2, 234-252.
- <sup>5</sup> Ecuador’s competition authority was established in 2012.
- <sup>6</sup> In 2004, the Italian Competition Council (AGCM) imposed a record fine of EUR 152 million on Telecom Italia, for abuse of its dominant position on the market for fixed network telecommunications services for business customers.
- <sup>7</sup> The Malaysia Competition Commission (MyCC) has proposed to impose a financial penalty of RM 307,200 on My EG Services Bhd (MyEG) for infringing section 10 of the Competition Act 2010. In 2013, MyCC issued its first proposed decision for abuse of a dominant position where MyCC proposed a MYR 4.5 million financial penalty on Megasteel Steel Sdn Bhd (Megasteel) for a margin squeeze. However, in April 2016, MyCC has determined that Megasteel has not infringed the abuse of dominant position prohibition under Section 10 of the Competition Act 2010.
- <sup>8</sup> <http://en.fas.gov.ru/documents/documentdetails.html?id=13903>;  
<http://en.fas.gov.ru/documents/documentdetails.html?id=13891>.
- <sup>9</sup> See John M. Connor, “The Rise of ROW Anti-Cartel Enforcement”, *CPI Antitrust Chronicle*, September 2015 (1).
- <sup>10</sup> See Alberto Heimler and Kirtikumar Mehta, “Violations of Antitrust Provisions: The Optimal Level of Fines for Achieving Deterrence”, 35 *World Competition* 103(2012).
- <sup>11</sup> <http://www.rekabet.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FRegulation%2Fyonetmelik11.pdf>.
- <sup>12</sup> Cartel and monopolisation base fine rates in Japan are as follows.

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

- <sup>13</sup> GCEU, 27 October 2010, *Alliance One International v. European Commission*, case T-24/05.
- <sup>14</sup> See ICN Setting of Fines for Cartels in ICN Jurisdictions, Report to the 7th Annual Conference in Kyoto, April 2008, at 11, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc351.pdf>.

- 15 Agency relationships usually create whenever a relationship between two parties – a principal and an agent  
- involves the agent making decisions on behalf of the principal.
- 16 Damien Geradin, *The EU Competition Law Fining System: A Reassessment*, TILEC Discussion Paper  
(2011), at 15.
- 17 OECD, *Cartel Sanctions against Individuals*, DAF/COMP(2004)39, at 5.
- 18 Id; see also ICN *Setting of Fines for Cartels in ICN Jurisdictions*, supra note 14, at 17.
- 19 Id.
- 20 ICN (2008), supra note 14.
- 21 See *Fines for breaking EU Competition Law*, available at  
[http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_en.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf).
- 22 See Press Release, *Competition: Commission revises Guidelines for setting fines in antitrust cases*,  
available at [http://europa.eu/rapid/press-release\\_IP-06-857\\_en.htm](http://europa.eu/rapid/press-release_IP-06-857_en.htm).
- 23 See *Administrative Surcharge System to deter Cartel Conduct Administrative Conduct*, available at  
<http://www.internationalcompetitionnetwork.org/uploads/library/doc656.pdf>.
- 24 Roger D. Blair and D. Daniel Sokol, *The Oxford Handbook of International Antitrust Economics*, Oxford  
University Press 2015.
- 25 *Antitrust deterrence in the US and Japan*, Stuart M. Chemtob (2000), available at  
<https://www.justice.gov/atr/speech/antitrust-deterrence-united-states-and-japan>.
- 26 If an AMP exceeded an exclusively deterrent purpose and thereby became sanction, it would require that  
criminal due process rights be afforded to a respondent. *See R v Wigglesworth*, [1987] 2 S.C.R. 541.
- 27 See *Competition Act*, section 79 (3.2), available at [http://www.competitionbureau.gc.ca/eic/site/cb-  
bc.nsf/eng/03497.html#s4\\_0](http://www.competitionbureau.gc.ca/eic/site/cb-<br/>bc.nsf/eng/03497.html#s4_0).
- 28 See *Latin American Competition Forum Session I: Criteria for Setting Fines for Competition Law  
Infringements Contribution from Chile (TDLC)*, available at  
[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2013\)13&do  
cLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2013)13&do<br/>cLanguage=En).
- 29 See *Latin American Competition Forum Session I: Criteria for Setting Fines for Competition Law  
Infringements Contribution from Peru*, available at  
[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2013\)11&do  
cLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2013)11&do<br/>cLanguage=En).
- 30 Id.
- 31 Ioannis Lianos, Frédéric Jenny, Florian Wagner-von Papp, Evgenia Motchenkova & Eric David , *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 69; ICN (2008) *Setting  
of Fines for Cartels in ICN Jurisdictions*, at 26; See also C-444/11 P *Team Relocations et al. v Commission*,  
judgment of 11 July 2013, EU:C:2013:464, para. 76.
- 32 See *Latin American Competition Forum Session I: Criteria for Setting Fines for Competition Law  
Infringements Contribution from Colombia (2013)*, available at  
[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2013\)9&doc  
Language=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2013)9&doc<br/>Language=En).
- 33 Paragraph (1) of Article 9 of the Decree of the Monopoly Regulation and Fair Trade Act.
- 34 Guidelines for the setting of fines in cartel administrative offence proceedings (2013), para 10.
- 35 Para 11.

- 36 See Guidelines on Financial Penalties (Date Published: 14 October 2014), available at <http://www.mycc.gov.my/sites/default/files/handbook/Guideline-on-Financial-Penalties.pdf>.
- 37 See Latin American Competition Forum Session I: Criteria for Setting Fines for Competition Law Infringements Contribution from Mexico (2013), available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2013\)19&doLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2013)19&doLanguage=En).
- 38 CCS Guidelines on the appropriate amount of penalty, available at <https://www.ccs.gov.sg/legislation/~media/custom/ccs/files/legislation/ccs%20guidelines/ccsguidelinepenalty20071033.ashx>.
- 39 OFT (CMA), OFT's guidance as to the appropriate amount of a penalty (2012), para 2.7.
- 40 Federal Sentencing Guidelines Manual §2R1.1.(b)(2).
- 41 In some jurisdictions, it will cover the overall consolidated turnover by the company (and its subsidiaries) worldwide in the relevant business year (the preceding year of the infringement or the last year of the infringement). See ICN (2008) Setting of Fines for Cartels in ICN Jurisdictions, supra note 14.
- 42 Law No.12,529/11, Art.37, available at [http://www.planalto.gov.br/CCIVIL\\_03/\\_Ato2011-2014/2011/Lei/L12529.htm](http://www.planalto.gov.br/CCIVIL_03/_Ato2011-2014/2011/Lei/L12529.htm).
- 43 *Excel Crop Care Ltd. v Competition Commission of India and Another*, Appeal No. 79 of 2012, delivered on 29 October 2013, available at [http://compat.nic.in/upload/PDFs/octordersApp2013/29\\_10\\_13.pdf](http://compat.nic.in/upload/PDFs/octordersApp2013/29_10_13.pdf).
- 44 ICN (2008), supra note 14, at 21, Five responding jurisdictions consider the duration as an adjusting factor.
- 45 For example, if the contravention lasted for 8 months, the Commission will apply a duration multiplier of 8/12.
- 46 Fines for breaking EU Competition Law, supra note 21.
- 47 Point 25 of the Guidelines on the method of setting fines (2006). Entry fee will be added after a percentage of value of relevant sales (0-30%) is multiplied by the number of years of the infringement, i.e., Basic fine = percentage of value of relevant sales × duration + entry fee.
- 48 In Japan, relevant turnover refers to the amount of sales of goods or services related to infringement in the affected market during the duration of the infringement.
- 49 See Endnote 12.
- 50 The Federal Sentencing Guidelines, Section 2.R1.1(d) relate to bid rigging, price-fixing and market allocation. This section, in subsection (d), provides Special Instruction for fines of organisations: "In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce".
- 51 Ioannis Lianos, Frédéric Jenny, Florian Wagner-von Papp, Evgenia Motchenkova & Eric David, supra note 31, at 183.
- 52 For example above, according to the method of the Commission, the values of sales will be USD160 million (USD 40 million × 4 years), while the actual value of sales would be USD 280 million. See Background Note by the OECD secretariat for Session 1 (Criteria for Setting Fines for Competition Law Infringements) at the LATIN AMERICAN COMPETITION FORUM, 3-4 September 2013, Lima, Peru, available at <http://www.oecd.org/competition/latinamerica/2013-latin-american-competition-forum.htm>.
- 53 According to EU 2006 Fining Guidelines, the European Commission defines recidivism (or repeated infringement) as the situation "where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed [Articles 101 or 102 TFEU]". EU General Court held "recidivism, as understood in a number of national legal systems, implies that a person has committed fresh infringements after having been penalised for similar infringements". Wils suggested that "[t]hese two definitions have in common that the same person or undertaking is found to have started or continued an infringement after having been

the addressee of a decision finding a similar infringement or imposing a fine for a similar infringement. Recidivism thus only exists if the second infringement starts or continues after the date on which the Commission or a national competition authority adopted the decision finding the first infringement (second infringement after a first decision)". See Wouter P.J. Wils (2012), ['Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis'](#), 35(1) *World Competition* 5.

54 Wouter P.J. Wils, *supra* note 53.

55 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] *OJ C 210/02*, para 28, "...where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82: the basic amount will be increased by up to 100 % for each such infringement established;"

56 Damien Geradin, *supra* note 16, at 40.

57 *Id* at 41.

58 Case C-413/08 *P Lafarge v. Commission* [2010] ECR I-5361, paras 68-84; Case C-3/06 *P Danone v. Commission* [2007] ECR I-1331, paras 37-39.

59 Damien Geradin, *supra* note 16, at 41.

60 Actually recidivism is rarely applied in the U.S. See John M. Connor, Oceanic Disparities in Cartel-Recidivism Attitude and Penalties.

61 Wouter P.J. Wils, *supra* note 53.

62 See Wouter P.J. Wils (2007), "The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis", *World Competition: Law and Economics Review*, Vol. 30, No. 2, June 2007.

63 Iwan Bos and Frederick Wandschneider (2011), "Cartel Ringleaders and the Corporate Leniency Program", CCP Working Paper 11-13, at 8-9.

64 Article 26 of DL 211

65 Guidelines, pt 29, fourth indent.

66 USSG §8C2.5(g)

67 See Andrea Oršulová and David Raus, *Competition Law in the Slovak Republic*, at 74.

68 Republic of Lithuania Law on Competition, Art. 37, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/49e68d00103711e5b0d3e1beb7dd5516?jfwid=q8i88mf0v>.

69 See OECD, *Promoting Compliance with Competition Law* (2011).

70 See Ginsburg & Wright, "Antitrust Sanctions", 6 *Competition Policy International* 3, 4 (2010).

71 In a speech in 2011, Joaquin Almunia, Vice President of the Commission responsible for Competition Policy at that time, reaffirmed that compliance programs implemented in companies that violate EU competition law have "failed" and thus cannot be considered as a mitigating factor in the assessment of the level of fine to be imposed. ("A successful compliance programme brings its own reward. The main reward for a successful compliance programme is not getting involved in unlawful behaviour. Instead, a company involved in a cartel should not expect a reward from us for setting up a compliance programme, because that would be a failed programme by definition." SPEECH/11/268, 14 April 2011)

72 <http://en.cade.gov.br/topics/publications/guidelines>.

73 In *U.S. v. Kayaba Industry Company*, the DOJ recommended a reduced fine of \$62 million which was based in part on its institution of an effective compliance programme. Further, at a speech before the Sixth Annual Chicago Forum on International Antitrust which was held in Chicago in June 2015, Deputy Assistant Attorney General Brent Snyder said "[t]he Antitrust Division is willing to consider compliance efforts in reaching a fine recommendation in cases where a company makes extraordinary efforts not just to put a compliance programme in place but to change the corporate culture that allowed a cartel offense occur."

74 See Wouter P.J. Wils (2006), *Optimal Antitrust Fines: Theory and Practice*; See also C-189/02 P *Dansk Rørindustri and Others v Commission*, Judgment of 28 June 2005, para 281.

75 Wouter P.J. Wils, *supra* note 74.

76 For example, A and B are cartelists in the same cartel in EU. While A is a multi-product company with a global turnover of EUR 600 million, B is a mono-product company with a global turnover of EUR 60 million. Suppose that both undertakings were involved in a same antitrust infringement and that A's value of sales the product affected by the infringement amounts only to 10% of its global turnover and therefore is EUR 60 million and it is equal to B's values of sales that correspond to 100% of its turnover. Suppose that the percentage of value of sales to determine the basic amount of fine is 20% for both undertakings. Therefore, the basic amount of fine is set at EUR 12 million, both for A and B. This is also the final amount of the fine calculated on the gravity of the infringement, leaving aside, for simplicity, other factors provided for in the Guidelines, such as infringement duration and aggravating and mitigating circumstances. When applying statutory limits which represent 10% of total company turnover, it only benefits B, whose fine is decreased to 6 million (10% of 60 million). But as for A, the fine of EUR 12 million does not exceed 10% of its global turnover. Therefore the final fine for A is set at EUR 12 million, while a fine of EUR 6 million is levied on B. See Pietro Manzini, *The Proportionality of Antitrust Fines*, available at <http://www.clgitalia.it/docs/The%20Proportionality%20of%20Antitrust%20Fines.pdf>.

77 See OECD, *Annual Report on Competition Policy Developments in Korea 2008*, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2008\)18/29&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2008)18/29&docLanguage=En).

78 The fines must be calculated in a way that ensures that only the most serious infringements such as price fixing over a long period of time are subject to a fine equivalent to 10% of the global turnover; Ioannis Lianos, Frédéric Jenny, Florian Wagner-von Papp, Evgenia Motchenkova & Eric David *supra* note 31, at 158, "If the 10% threshold were a mere cap, a fine of greater than 10% of the turnover could result not only in the most serious cases, but even in the case of only low to medium range infringements, and in all these cases the fine would be capped at the same level, namely 10% of the turnover. This would not comply with the general rules on sanctions for criminal and administrative offences, which require that the sanction be proportionate to the offence, and that the highest possible fine can only be imposed for the most serious case conceivable..."

79 See *Recent developments in German competition law*, available at <http://www.lexology.com/library/detail.aspx?g=c24c8ef2-b678-4b17-b3a1-ebc4af2ca91b>.

80 KRB 20/12 of 26 February 2013 in German, available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=cd8f8f4e149023d9a8f8d3069a8ff38b&nr=63748&pos=0&anz=1>.

81 ICN (2008), *supra* note 14, at 26, 44. Only four of responding agencies (Jordan, Mexico, Netherlands and Hungary) indicated that they have no possibility to take this factor into account. However it must be noted that two of the four agencies can indirectly consider the financial status (Mexico) or the risk of bankruptcy (the Netherlands). Therefore, it appears that the inability to pay a fine is a factor that is generally considered in all jurisdictions in one way or another.

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

83 The European Commission granted reductions of fines to 13 companies on account of inability to pay between November 2009 and December 2012.

84 "Inability to pay" – how final is a fines decision?, Jessica Walch, available at <http://kluwercompetitionlawblog.com/2013/01/31/inability-to-pay-how-final-is-a-fines-decision/>.

85 Damien Geradin, *supra* note 16, at 36.

86 Levenstein, Margaret C. and Suslow, Valerie Y., “Constant Vigilance: Maintaining Cartel Deterrence During the Great Recession”, *Competition Policy International*, Vol. 6, No. 2, pp. 145-162, Autumn 2010.

87 <http://globalcompetitionreview.com/news/article/32820/crt-cartelist-obtains-record-inability-to-pay-fine-cut/>.

88 India, Cartel & Leniency 2016 (ICLG, International Cooperative Legal Guides, available at <https://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2016/india>).

89 See The heavy hand of the competition commission, available at <http://www.nortonrosefulbright.com/news/44650/the-heavy-hand-of-the-competition-commission>.

90 See, Londiwe Senona, The dichotomy between the penalty regime in competition law and the firm’s ability to pay: South Africa’s experience, available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Londiwe-Senona-Article-Administrative-penalties-2.pdf>.

91 Section 7 of the Guidelines provides:

#### 7. ABILITY TO PAY THE ADMINISTRATIVE PENALTY

7.1. The Commission may, after determining an appropriate administrative penalty and in exceptional circumstances, consider the firm’s ability to pay the administrative penalty. This will be the exception and there must be no expectation that the administrative penalty will be adjusted on this basis. In these circumstances, the Commission will be mindful of the firm’s financial position and market circumstances in order to avoid imposing substantial hardship on a particular firm that may lead to a significant reduction in competition. This does not negate the need for consideration of the principle of proportionality and fairness.

7.2. To be considered for this, the firm must provide the Commission with objective evidence that the imposition of the administrative penalty as provided for in these guidelines would irretrievably jeopardise the ability of the firm concerned to continue trading and exit. This evidence may include, but will not be limited to, audited financial statements attesting the veracity of the firm’s financial position. The Commission will consider the financial viability of the firm as a whole and not of any specific division(s).

92 See Margaret C. Levenstein and Valerie Y. Suslow, *supra* note 86.

93 See Media Release, Monday, 22 August 2016, available at <http://www.compcom.co.za/wp-content/uploads/2016/01/Press-release-ArcelorMittal-final-1.pdf>.

94 Wouter.P.J. Wils (2008) *Efficiency and Justice in European Antitrust Enforcement*, Hart Publishing 137, Wils argued “[s]uccessful cartels tend to be sophisticated organisations, capable of learning. It is thus safe to assume that cartel participants will try to adapt their organisation to leniency policies, not only so as to minimise the destabilising effect, but also, where possible, to exploit leniency policies to facilitate the creation and maintenance of cartels.

95 Samuel Miller and Ryan Sandrock, “Parental Liability For A Subsidiary’s Antitrust Violations Under U.S. Law”, *CPI Antitrust Chronicle*, November 2009, at 2, available at [https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/SandrockNOV-09\\_1\\_.pdf](https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/SandrockNOV-09_1_.pdf).

96 *Id* at 2; See also Eggert, David and Hou, Jingbo (2009), “Liability of a Parent for the Antitrust Violations of a Subsidiary Under Asian Antitrust Law”, *Competition Policy International Chronicle*, November 2009, available at <https://www.competitionpolicyinternational.com/liability-of-a-parent-for-the-antitrust-violations-of-a-subsiary-under-asian-antitrust-law/>.

97 Case COMP/E-1/36.490 - Graphite electrodes, para. 123, “Finally, the Commission considers that there might be difficulties in collecting any fine from a dormant company with no commercial activity and whose continued existence depends entirely upon the tax advantages it brings VAW Aluminium AG.”

98 Damien Geradin, *supra* note 16, at 16.

99 C-123/13 P *Versalis SpA and Eni SpA v Commission*, Judgment of 5 March 2015.

100 C-123/13 P *Versalis SpA and Eni SpA v Commission*, Judgment of 5 March 2015, para 96.

- 101 Id.
- 102 C-580/12 P *Guardian Industries and Guardian Europe v. Commission*, judgment of 12 November 2014.
- 103 C-231/14 P *InnoLux Corp. v. Commission*, judgment of 9 July 2015, EU:C:2015:451, para. 63.
- 104 C-231/14 P *InnoLux Corp. v. Commission*, judgment of 9 July 2015, EU:C:2015:451, para. 56.
- 105 See OECD, Cartels involving intermediate goods, DAF/COMP/WP3(2015)18.
- 106 See Elizabeth Coleman, *InnoLux Corp. v European Commission: How to Calculate the Fine When the Cartel Concerned Components of Final Products*, *Journal of European Competition Law & Practice* 2016, Vol.7, No. 3.
- 107 See Lukas Ritzenhoff, *Indirect Effect: Fine Calculation, Territorial Jurisdiction, and Double Jeopardy*, *Journal of European Competition Law & Practice*, 2015, Vol. 6, No. 10.
- 108 D. Sokol and Ioannis Lianos, *The Global Limits of Competition Law* (2012), there are the two systems of judicial scrutiny which are appellate review and judicial review. Appellate review is “the general term for the process by which upper courts scrutinize matters decided by lower courts” and judicial review refers to “the court’s overriding power to determine if an administrative decision is legally defective.”
- 109 See ICN, *Competition and the Judiciary: A Report on a Survey on the Relationship Between Competition Authorities and the Judiciary* (2006), for 47% of the respondents, appeals to the judiciary have suspensory effects. Eighteen agencies from 17 jurisdictions answered the questionnaire.
- 110 See *Cartels & Leniency 2016*, 7. Appeal Process, available at <http://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2016>.
- 111 See ICN, *Report on the Agency Effectiveness Project Second Phase – Effectiveness of Decisions*, Presented at the 8th Annual Conference of the ICN Zurich, June 2009, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc375.pdf>.
- 112 See John M. Connor, *supra* note 9.
- 113 *Competition Commission of India Recovers Just Rs. 1,000 Crore of Rs. 12,000 Crore SoFar*, (November 19, 2014), available at [http://articles.economictimes.indiatimes.com/2014-11-19/news/56265816\\_1\\_fair-trade-norms-competition-commission-crore-penalties](http://articles.economictimes.indiatimes.com/2014-11-19/news/56265816_1_fair-trade-norms-competition-commission-crore-penalties).
- 114 See UNCTAD, *Voluntary Peer Review of Competition Law and Policy: Ukraine* (2013).
- 115 See ICN (2009), *supra* note 111.
- 116 Id.
- 117 See OECD, *Trade Associations*, DAF/COMP(2007)45.
- 118 See Regulation 1/2003 (OJ 2003 L1/1), Article 23, para 4.
- 119 Second Report by the Competition Committee on Effective Action Against Hard Core Cartels, DAF/COMP(2003)2. The Second Cartel Report explained “[w]hether or not it is legally possible to impose an optimal organisational fine and practically possible to calculate it in a given case, actually imposing it might present problems. The optimal fine could simply be too large for the entity to bear, causing bankruptcy and possible exit from the market, which itself could diminish competition. Thus, there is a place for sanctions against natural persons, placing them at risk individually for their conduct. Such sanctions can complement organisational fines and provide an enhancement to deterrence.”
- 120 D. Ginsburg & J. Wright, *supra* note 70, “[I]t may simply be that corporate fines are misdirected, so that increasing the severity along this margin is at best irrelevant and might counter-productively impose costs upon consumers in the form of higher prices as firms pass on increased monitoring and compliance expenditures.”
- 121 Wouter P.J. Wils, *supra* note 74.

- 122 D. Ginsburg & J. Wright, *supra* note 70, They argued “the individuals responsible for the cartel activity, whether they are engaged in, complicit with, or negligent in preventing the price-fixing scheme, should be given a sufficient disincentive to discourage them from engaging in that activity.”
- 123 See Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, available at <http://londonconomics.co.uk/wp-content/uploads/2011/09/30-An-assessment-of-the-UK-Discretionary-Penalties-Regime.pdf>.
- 124 See Wouter P.J. Wils (2005), *Is Criminalization of EU Competition Law the Answer?*
- 125 William Kolasky, 'Criminalizing Cartel Activity: Lessons from the U.S Experience', available at [https://www.coleurope.eu/sites/default/files/uploads/event/kolasky\\_-\\_criminalizing\\_cartel\\_activity\\_8-04.pdf](https://www.coleurope.eu/sites/default/files/uploads/event/kolasky_-_criminalizing_cartel_activity_8-04.pdf).
- 126 Joel I Klein, 'The war against international cartels: Lessons from the battlefield', Fordham Corporate Law Institute, 26th Annual Conference on International Antitrust Law and Policy, New York, October 14th 1999.
- 127 See Keith Jones and Farin Harrison “Criminal Sanctions: An overview of EU and national case law”, e-Competitions Bulletin Criminal sanctions, Art. N° 64713, 25 March 2014.
- 128 Wouter P.J.Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics* (The Netherlands: Kluwer Law International, 2002) at 221.
- 129 See OFT, *supra* note 123.
- 130 William Kolasky, *supra* note 125.
- 131 See A. Jones and R. Williams (2014), “The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?”, *Journal of Antitrust Enforcement* 100.
- 132 In July 2016, the upper house of Chile’s parliament approved the legislation that will criminalise cartels.
- 133 A. Jones and R. Williams, *supra* note 131.
- 134 This case relates to an international bid rigging in the supply of specialist hoses used to transmit petroleum products from offshore facilities and vessels. The directors pleaded guilty to the UK criminal cartel charges under plea agreements with the US DOJ.
- 135 In 2010, the OFT decided that it had dropped the criminal proceedings against four British Airways executives after the discovery of thousands of documents which had not been disclosed to BA or reviewed by the OFT.
- 136 In this case, a director pleaded guilty before trial, the other two fought the case, and the trial led to the acquittal of them.
- 137 See OECD (2004), *supra* note 17; See also A. Jones and R. Williams, *supra* note 124.
- 138 The Cartel Project is an interdisciplinary research project that has been funded by the Australian Research Council over the period 2009 to 2011. See Caron Beaton-Wells et al., *The Cartel Project: Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement* (University of Melbourne Legal Studies Research Paper No. 519, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1743268](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743268).
- 139 See Caron Beaton-Wells and Christine Parker (2013), “Justifying Criminal Sanctions for Cartel Conduct: A Hard Case”, (2013) 1(1) *Journal of Antitrust Enforcement* 198.
- 140 See OECD (2004), *supra* note 17; See also Paul K. Gorecki and David McFadden, “Criminal cartels in Ireland: the Heating Oil case”, (2006) *European Competition Law Review* 27(11), 631-640.
- 141 See Aaron Khan, “Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer?”, (2012) 35 *World Competition*, Issue 1, pp. 77–102.
- 142 Wouter P. J. Wils, *supra* note 124, at 36.
- 143 Ginsburg & Wright, *supra* note 70, “The first advantage is that debarment, like jail, imposes a direct and substantial opportunity cost upon individuals who engage in price-fixing... The second and indirect

advantage is that debarment enhances the likelihood and magnitude of the reputational sanction imposed by the job market.”

144 Wouter P.J. Wils, *supra* note 124, at 39.

145 UK Office of Fair Trading, *The Deterrent Effect of Competition Enforcement by the OFT*, at 72 (November 2007).

146 See W.P.J.Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics* (The Netherlands: Kluwer Law International, 2002).

147 Wouter P. J. Wils, *supra* note 124, at 38; See also Andreas Stephan (2011), “Disqualification Orders for Directors Involved in Cartels”, 2(6) *Journal of European Competition Law & Practice* 529-536, at 9.

148 Aaron Khan (2012), “Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer?”, 35 *World Competition*, Issue 1, pp. 77–102, at 96; See also W.P.J.Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics* (The Netherlands: Kluwer Law International, 2002).

149 Wouter P. J. Wils, *supra* note 142, at 38; See also Andreas Stephan (2011), “Disqualification Orders for Directors Involved in Cartels”, 2(6) *Journal of European Competition Law & Practice* 529-536, at 9.

150 Aaron Khan, *supra* note 148, at 94-95.

151 See OECD, *Changes in Institutional Design of Competition Authorities Note by Lithuania*, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2014\)136&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)136&docLanguage=En).

152 Chambers & Partners, *Competition: Cartels (Russia)*, available at <http://www.chambersandpartners.com/guide/practice-guides/location/247/6700/1929-200>.

153 Art.38 of Law N° 12.529 of November 30, 2011, available at <http://www.oabsp.org.br/comissoes2010/regulacao-economica/legislacao/LAW%20No%2012529%202011%20-English%20version%20from%2018%2005%202012.pdf/download>.

154 Article L464-2 I, para. 5 of the Commercial Code, available at [http://www.autoritedelaconurrence.fr/doc/code\\_commerce\\_gb.pdf](http://www.autoritedelaconurrence.fr/doc/code_commerce_gb.pdf).

155 See OECD, *Bribery in Procurement, Methods, Actors and Counter-Measures* (2007). In OECD countries, public procurement accounts for approximately 15% of GDP. In many non-OECD countries the percentage is even higher.

156 ICN, *Anti-cartel enforcement manual* at 14.

157 Emmanuelle Auriol, and Maleke Fourati, “An Economic Analysis of Debarment”, TSE Working Paper, n. 15-599, September 11, 2015, at 25-26.

158 OECD, *Collusion and Corruption in Public Procurement*, DAF/COMP/GF(2010)6, at 31, available at <https://www.oecd.org/competition/cartels/46235884.pdf>.