

Unclassified

DAF/COMP/GF/WD(2016)50

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

09-Nov-2016

English - Or. English

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

Global Forum on Competition

SANCTIONS IN ANTITRUST CASES

Contribution by Ukraine

-- Session IV --

1-2 December 2016

This contribution is submitted by Ukraine under Session IV of the Global Forum on Competition to be held on 1-2 December 2016.

Ms Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division,
Tel: +33 1 45 24 18 77, Email: Lynn.Robertson@oecd.org.

JT03405003

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/GF/WD(2016)50
Unclassified

English - Or. English

SANCTIONS IN ANTITRUST CASES

-- Ukraine --

1. Determination of the basic fine

If you have imposed fines in antitrust cases, please describe type and nature of financial sanctions in antitrust cases (civil, administrative, criminal, combined): On whom (e.g. companies, individuals) can sanctions be imposed?

1. Antimonopoly Committee of Ukraine (further AMCU) imposes following types of sanctions in antitrust cases:

- administrative fines on the companies offended the competition law;
- Administrative sanctions on the individuals are foreseen in the law.
- Criminal sanctions are not foreseen in the law;
- Combined sanction is illustrated by "black list" of companies participated in bid rigging. Black-listed companies are banned from public procurement procedures during three years after the AMCU decision about the violation.

What kinds of laws or regulations provide criteria for determining fines? If you have guideline(s) on calculation of fines or detailed rules for calculating fines, when have you introduced the guidelines (or rules) and what aspects do the guidelines (or rules) include? (e.g. how to set the base fine, mitigating and aggravating circumstances)

2. Law on Protection of economic competition and Law on Protection from unfair competition set the cap for the fine amount on the level of 1%, 5% and 10% from the annual revenue of the year prior to fine application. The cap level depends on type of infringement. The first fines guideline (so-called recommended instruction on application the specific provisions of the law) was created in September 2015. The guideline includes main principles (proportionality, non-discrimination and rationality) of fines calculation. On the first stage the basic fine is defined based on gravity of the infringement. On the second stage mitigating and aggravating circumstances (if any) are taken into consideration.

Is the proportionality principle explicitly provided under laws, regulations or guidelines for determining fines? How do you respect the proportionality principle when calculation the amount of the fine?

3. The proportionality principle is one of the main principles set in the guideline. It is reached by the set of three indexes applied for basic fine determination. Such approach allows to apply proportionality principle for the concrete case as well as clear structure the AMCU discretion in fines determination. As a result, fine has to ensure deterrent effect, proportional to size and specific of the infringement.

2. Adjustment of the basic fine

If you have mitigating and aggravating circumstances in laws, regulations or the guidelines, which circumstances are frequently applied in antitrust cases?

4. Mitigating and aggravating circumstances application are foreseen by the fines guideline. Frequently applied are circumstances related to cooperation with AMCU or refuse to cooperate, as well as cases where infringement was stopped before the final decision of the Committee.

If you consider recidivism for imposing fines (e.g. an aggravating circumstance for calculating fines), have you noticed whether repeated offenders have become more or less frequent over time? What are the reasons in your view for any increase or decrease?

5. Recidivism is taken into consideration in fines guideline as a possibility to double the basic fine (except fines related to not provided information upon AMCU request). However, as only one year passed after the fines guideline creation, it is too early to make any conclusions regarding the impact on recidivism frequency.

Should competition authorities treat the fact that competition law offenders have antitrust compliance programmes (CPs) as an aggravating or mitigating circumstance? If you consider CPs for imposing fines (e.g. a mitigating circumstance for calculating fines), what are the grounds for adopting CPs as a circumstance? How do you distinguish genuine programmes from sham ones which are only seeking reduction of fines?

6. Despite the proposals from antitrust lawyers to include existence of compliance programme (CP) as a mitigating circumstance and experience of some neighbour countries, AMCU doesn't force to take it into consideration in the fine calculation. The main reason is difficulties in distinguishing of genuine CP from just a set of papers, which anyway didn't prevent the company from antitrust violation. At the same time, AMCU fully supports and promotes antitrust compliance culture in the business as a competition advocacy instrument. Also AMCU is working on own antitrust compliance programme targeted on companies who can't afford a staff compliance officer or expensive CP development.

In your jurisdiction, may a parent company be held jointly and severally liable for antitrust violations committed by its subsidiary (i.e. parental liability) in certain circumstances? If so, how does parental liability have a significant impact on the way fines are calculated?

7. So far a parental liability is not foreseen in the law and fines guideline.

Do you consider 'inability to pay' in imposing or collecting the fine? If so, please specify the exact circumstances under which this criterion could be applied and the method of application.

8. In line with position of EU Court of Justice "Inability to pay" is not directly taken into consideration in imposing the fine by AMCU. Still the provision of the law sets the possibility for the company to apply regarding delay of instalment of penalty payment. In practice this provision is not used. To avoid situation when fine can't be collected due to inability to pay, in case of null turnover, the special provision of the law sets minimum fine from ~ 1176 EUR to ~11769 EUR depending on the infringement.

3. Practical issues in determining the amount of fines

Does your law provide for an appeal against a decision that levies fines on competition law infringers? Does an appeal to a decision imposing a sanction / fine bring an automatic suspensory effect on the sanction / fine? If it is necessary to apply for suspension, what are the criteria?

9. Decisions of the AMCU may be appealed to the court within two months after the company was informed about it. The fine has to be paid within the same period, then the surcharge is being calculated. An appeal to decision doesn't bring an automatic suspensory effect to the decision itself and fine in particular, but in certain cases defined in the law it may be stopped.

How often does judicial scrutiny modify the amount of fines? What kind of reasons does judicial scrutiny provide to alter the amount of fines imposed by competition authorities?

10. So far practice showed that amount of fine is not changed, it rather remained on the initial level or decision is cancelled as a whole. However, the structured discretion of fine calculation according to the fines guideline may lead to fines modification in the court by the judicial scrutiny.

In your cases, have you faced situation where you imposed fines on companies but failed to collect the fines? If so, what are the reasons? How do you encourage or force the companies to comply with payment orders?

11. Current law set up prerequisites the situations where imposed fines are not collected. Main reasons are:

- the AMCU's decision doesn't have a power of enforcement document in terms of fines collection. If the fine is not paid deliberately by offender, AMCU has to go to the court, to pay the state duty (!), to obtain enforcement document issued by the court, and then to apply to the State Enforcement Service of Ukraine and wait for the long procedure of execution. In the end of the story the company may simply register another legal entity, transfer there actives and business, and the entity liable for fine will be empty and the fine simply could not be collected.
- The necessity of state duty payment by AMCU for application to the court may be itself an obstacle due to budget constraints.
- Absence of parental liability for imposed antitrust fines.

12. Understanding main difficulties in fines collectability, AMCU works on draft changes to the law in order to have the power of executive document for fines collection. Regarding this power and parental liability implementation AMCU expect support of current OECD peer review recommendations.

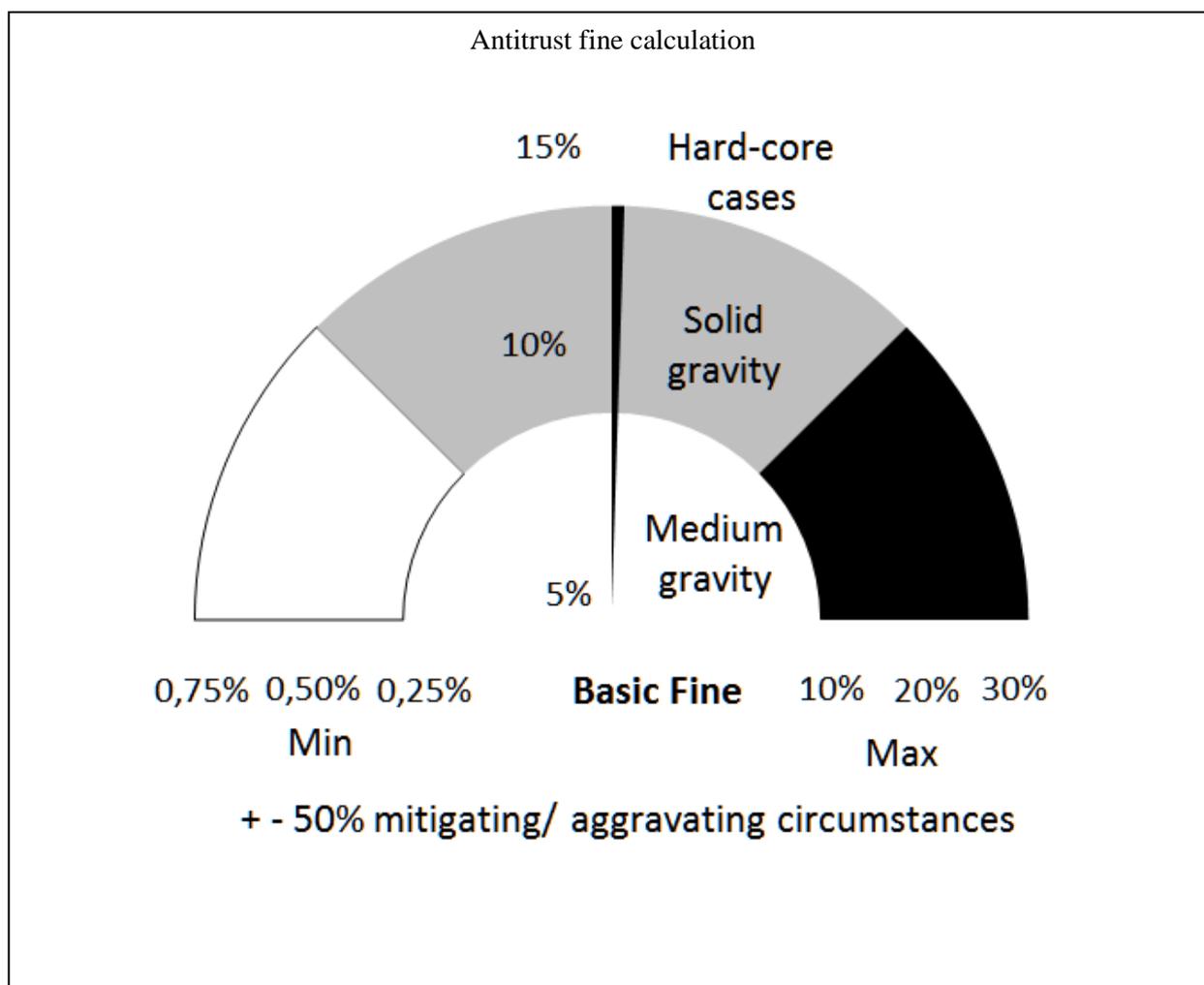
4. Do you have any evidence on whether fine levels are sufficient to deter illegal activities?

In order to achieve an "optimal" level of corporate fines, in your jurisdiction, what aspects of criteria for determining fines need to be changed?

13. Sufficient level of fine has to exceed the illegal gain to make a deterrent effect. At the same time amount of fine shouldn't eliminate or weaken the competition or lead to bankruptcy. In order to achieve an optimal level of fine, the Fines guideline includes possibility to apply three indexes in basic fine determination, which may increase or decrease the amount of basic fine in 2 times. These indexes takes into consideration impact of the violation on the adjacent market, social importance of the goods (services)

and of profitability related to the infringement. The percentage of fine is applied to revenue relevant to the infringement.

14. For the violations related to wrong/not sufficient/not provided information, the fixed amounts of fines are defined in the Guideline.



In your jurisdiction, is there a leniency programme? If so, how does a leniency programme interact with fines? Have you observed heavier sanction such as higher fines compared to illegal gains encourage more applications for leniency?

15. Leniency programme is foreseen by the Law on Protection of economic competition, and respective secondary legislation was introduced in 2012. The company took part in anticompetitive concerted action and informed the AMCU about the infringement, is not liable to fines. The rule is not applied if the company initiated these concerted actions, didn't provide sufficient evidence and didn't stop the concerted actions after informing the AMCU. Leniency applications are rare due to absence of criminal responsibility and local mentality specifics. Currently AMCU is building trust of the society and enhancing information regarding leniency programme.

5. Alternatives to fines

What sanctions in addition to those fines mentioned above can be imposed on individuals who are involved in anticompetitive conduct?

16. Only administrative fines may be applied to individuals.

If your jurisdictions provide criminal sanctions against individuals including imprisonment, how many cases did you handle for last few years?

17. Criminal sanctions are not foreseen in the law

Has private enforcement, especially private damages, increased in your jurisdiction? If so, how do private damages interact with sanctions?

18. Currently the increased trend of private damages enforcement doesn't appear.

Do you use or plan to use disqualification orders on individuals for sanctions? If so, what are the strengths and weaknesses for the disqualification orders?

19. Disqualification orders are not imposed and planned for individuals.

How effective are fines imposed on individuals if there is no prohibition against reimbursing individuals? On the other hand, can prohibitions against reimbursement be effective?

20. It would be difficult to prohibit private companies to reimburse the individual sanctions. However, individual fines may be effective for public servants in case of violations by state authorities.

If differences exist between bid rigging cases and other forms of hard core cartels in terms of sanctions (e.g. bans on bidding for public contracts), what are the result for those differences? Have you found the differences effective?

21. Both bans on bidding for public contract as well as fines are effective. For companies with high share of sales to state bodies the ban on public procurement for 3 years according to the law seems to be even more effective than fines.

What other sanctions have been used and found successful in your jurisdiction?

22. Not applicable

What are the experiences concerning the effectiveness of various sanctions in order to achieve deterrence and punishment? Are there ways to assess the effectiveness of sanctions, including combinations of sanctions? Do you have any suggestions on ways to improve the effectiveness of combinations of sanctions?

23. As only one year passed after the fines guideline creation, and last changes were made in August 2016, the assessment of fines effectiveness is just started.