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SANCTIONS IN ANTITRUST CASES

Contribution by BIAC

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SANCTIONS IN ANTITRUST CASES

-- BIAC --

1. Introduction

1. Determination of the proper role of sanctions in antitrust enforcement requires consideration of the primary goal of antitrust enforcement, i.e., the promotion of competitive and efficient markets. An important means of achieving this goal is deterrence, when deterrent sanctions are set at an optimal level that appropriately and proportionately discourages potential antitrust infringers from violating the law without discouraging aggressive yet procompetitive conduct. There are additional means of achieving the fundamental goal of antitrust enforcement, such as advocacy, restitution, and compensation of victims. These additional means, to the extent that they exist or are in development in any jurisdiction, must also be factored-in to the analysis. But it is clear that optimizing deterrence through sanctions already requires that a careful balance be achieved.

2. Although, at least in principle, deterrence can be pursued by either a public or private enforcement system, it is commonly recognized that deterrence is the primary objective of public enforcement and, as such, better pursued by competition authorities.¹ Deterrence is attained primarily through the imposition of fines and/or incarceration, which not only serves to punish and discourage actual offenders from breaching antitrust law in the future, but also to deter other individuals from engaging in behavior that is contrary to antitrust laws.²

3. In this paper, BIAC puts forward considerations with respect to the types of activity which should be subject to sanctions, the desire and methods to create optimal and proportional sanctions, the importance of leniency programs, the need for caution in applying recidivism multipliers, appropriate recognition of genuine compliance efforts, and the role of private enforcement in achieving an optimal balance of deterrence, and the need for agencies to respect comity and avoid extraterritorial remedies.

4. BIAC would like also to note that businesses, as well as consumers, are victims of anticompetitive behavior, and the vast majority of companies desire to conduct business ethically and would benefit from achieving optimal deterrence of anticompetitive behavior.

2. Fines should be Focused on Criminal or Hard-Core Cartel Activity

5. Fines are an appropriate remedy for hard core cartel activity such as naked horizontal price fixing, bid rigging, and market allocation.

¹ Wouter P.J. Wils, *The Relationship Between Public Enforcement and Private Actions for Damages*, 32:1 *WORLD COMPETITION* 8 (2009).

² *Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003*, ¶ 4, 2006 O.J. (C 210) 2; *Case C-41/69, ACF Chemiefarma v. Comm'n*, 1971 E.C.R. 397, ¶ 173; *Case C-308/04, SGL Carbon AG v. Comm'n*, 2006 E.C.R. I-5977, ¶ 37; *Case C-76/06 P, Britannia Alloys & Chem. Ltd. v. Comm'n*, 2007 E.C.R. I-4405, ¶ 22.

6. Fines are not necessarily an appropriate remedy for abuse of dominance, vertical and other non-cartel restraints except in certain circumstances such as where there has been a clearly established intentional failure to comply with a pre-existing order. For these types of conduct, remedial or injunctive relief may be more appropriate. Unlike cartel conduct, other types of behaviors which, at times, can rise to the level of an offence also have the potential to create pro-competitive benefits or efficiencies. These potential infringements are often difficult to analyze, may cause harm only in limited circumstances, and could potentially be benign or have pro-competitive features, even if, on balance, they are deemed anticompetitive. Because of their complex nature, extending identical penalties and criminal penalties to non-cartel activity risks deterring efficient conduct, such as non-collusive vertical restraints, which could be mistakenly attacked as price-fixing.³ Because the risk of chilling potentially procompetitive activity is great as to unilateral activity, fines are typically a less appropriate remedy, and other remedies (such as injunctive relief) may be more appropriate.

7. While some jurisdictions elect to impose fines in abuse of market dominance cases, the Secretariat notes that the majority of fines across all jurisdictions are against cartel participants.⁴ Imposing high sanctions for conduct that is not well-understood to be irredeemably anticompetitive may make the enforcement of competition law appear capricious and hard to rationalize. Moreover, business people may begin to view normal, pro-competitive conduct as unduly risky and therefore moderate their aggressively competitive behavior.

3. Optimal Sanctions, Proportionality, and Avoiding Excessive Punishment

8. As a general rule, fines should be set at an optimal level to prevent anticompetitive conduct without undue penalization or chilling of aggressive pro-competitive conduct. The total sanction, factoring corporate fines, individual sanctions and private damages, must be great enough to take the profit out of price-fixing. To achieve sufficient deterrence against cartel activity, sanctions should be greater than a cartel's expected gains, ensuring that price-fixing—when accounting for the likelihood of being caught—will not have a likely profitable outcome. BIAC recognizes the difficulty in calculating optimal sanctions, but would caution competition agencies to take care to avoid imposing penalties at levels that far exceed what would be necessary to deter unlawful behavior as the principle of proportionality must also be respected.

3.1 Sanctions Against Companies

9. Of initial concern in determining sanctions is the measure used in determination of the basic fine. BIAC supports the majority of jurisdictions which use relevant turnover, rather than global turnover, as the basis for calculation of the fine. As an example, BIAC would support the EU measure of relevant sales 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.”⁵ While a minority of jurisdictions such as Brazil, India, and Turkey use global turnover as their measure for calculating a basic fine,⁶ this method can lead to fines not grounded in actual harm to the country applying sanctions and therefore can lack proportionality. Similarly, BIAC supports

³ Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6(2) COMPETITION POL'Y INT., Autumn 2010, at 8.

⁴ OECD, *Global Forum on Competition, Sanctions in Antitrust Cases*, Background Paper by the Secretariat, DAF/COMP/GF(2016)6 (Oct. 14, 2016), available at [www.oecd.org/officialdocuments/displaydocument/?cote=daf/comp/gf\(2016\)6&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocument/?cote=daf/comp/gf(2016)6&doclanguage=en), at 7.

⁵ See *id.* at 11.

⁶ See *id.* at 12.

the approach of a minority of jurisdictions which also use a percentage of relevant turnover, rather than global turnover, in establishing a maximum fining cap for any given violation.

10. Once sanctions are established at a reasonable level, in relation to other serious breaches of economic law and business regulation, any further increase is either unnecessary or unlikely to improve compliance. BIAC is of the opinion that sanctions for breach of competition law in many jurisdictions have already reached or exceeded levels required for maximum deterrent effect. It is not the case, in BIAC's experience, that companies that consider violating competition law and are prepared to go ahead, even if sanctions are serious, would be deterred if sanctions were increased to a higher level. Imposition of disproportionately high fines incentivizes excessive corporate monitoring and compliance expenditures that may ultimately be passed to consumers in the form of higher prices and in the form of foregone products or developments.

11. Fines should be limited for companies struggling financially. Jurisdictions should keep focus on promoting competition which will not be aided by sending companies into bankruptcy, ultimately decreasing competition. BIAC contends that agencies should consider fine reductions or alternative repayment methods for those firms with an inability to pay or that may go into bankruptcy if forced to pay the entire fine.

12. BIAC also argues that corporate debarment from public procurement or other bidding processes is not a sensible remedy as it removes competitors from the market place and harms overall competition. While debarment can be considered as a strong deterrent against firms which rely on bidding to conduct their activities, ultimately the removal of a potential supplier from the marketplace reduces the number of qualified bidders, thus harming competition and potentially raising overall prices.

3.2 Sanctions Against Individuals

13. BIAC recognizes that corporate fines alone may not achieve optimal deterrence of anticompetitive behavior. Ginsburg and Wright argue that levying increasingly higher fines on corporations is "misguided" and that agencies should instead focus on imposing sanctions and director disqualifications against persons involved in price-fixing or who knowingly violate competition laws.⁷ While the mode of individual sanctions and the severity of such penalties should be the subject of further study, BIAC agrees that holding responsible individuals accountable for hard-core cartel infringements would further the deterrent objectives of competition law enforcement.

14. In the United States, the Department of Justice is implementing a policy of pursuing individual accountability for corporate crimes, including antitrust violations.⁸ Former Deputy Assistant Attorney General Scott Hammond has stated the belief of the DOJ that "[i]t is indisputable that the most effective deterrent to cartel offenses is to impose jail sentences on the individuals who commit them."⁹ A number of other countries have begun implementing sanctions against individuals as part of their arsenal to combat

⁷ Ginsburg & Wright, *supra* note 3, at 6.

⁸ Brent Snyder, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Individual Accountability for Antitrust Crimes, Address Before the Yale Global Antitrust Enforcement Conference (Feb. 19, 2016), available at www.justice.gov/opa/file/826721/download; see also Sally Quillian Yates, Deputy Att'y Gen., Dep't of Justice Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), available at www.justice.gov/dag/file/769036/download.

⁹ Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Charting New Waters in International Cartel Prosecutions, Address Before the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime 13 (Mar. 2, 2006), available at www.justice.gov/atr/speech/charting-new-waters-international-cartel-prosecutions.

anticompetitive behavior. BIAC accepts the significant deterrent effect of criminal sanctions for antitrust offenses, but is concerned that a proliferation of criminal prosecutions, in the case of “global” cartels, could lead to disproportionate penalties and a risk of “double jeopardy” for the individuals involved.

15. Where anticompetitive behavior may not warrant the extreme punishment of imprisonment, director disqualification offers an alternative means of imposing a sanction against individuals violating competition law. As the Secretariat notes, disqualification is much less costly than imprisonment, while still achieving the deterrent benefits of sanctions against individuals which merely increasing fines cannot effectively accomplish.¹⁰ Wright and Ginsburg believe that a director will be equally deterred by a prison sentence or debarment, making the lower cost option of debarment an attractive solution.¹¹

16. Severe penalties may deter efficient conduct if applied to abuse of dominance cases and vertical restraints cases. For example, if the penalties relating to predatory pricing are severe, companies may be deterred from aggressive, yet lawful, low pricing. This is especially true given the uncertainty around the calculation of a “predatory” price. As with the imposition of fines, it is BIAC’s position that criminal or quasi-criminal penalties should not be extended to non-cartel activity to avoid discouraging potentially procompetitive behavior for fear of criminal or other sanctions against an individual.

3.3 *Extraterritoriality and Remedies in Antitrust*

17. BIAC appreciates that agencies want to preserve their ability to combat anticompetitive conduct to the full extent of their antitrust laws and to impose remedies necessary to do so. To this end, agencies should enforce their antitrust laws over foreign commerce only where there is a direct, substantial, and reasonably foreseeable effect on domestic consumers, and only as to the extent of that effect. This allows an agency to take remedial action where foreign anticompetitive conduct has a domestic effect on consumer welfare. Agencies should use caution in applying remedies that have impacts outside of their own jurisdiction.

18. Sanctions and remedies should be constrained to matters where the conduct has caused domestic consumer injury. Injury to domestic companies in their capacity as competitors, absent consumer harm, should not be a basis for imposing a sanction or remedy. In this context, a sanction or remedy to protect a domestic competitor cannot be distinguished from protectionist activity. Moreover, even where harm to domestic consumers exists, any sanction or remedy should be constrained to that harm and should not be extended to address impacts on domestic competitors.

19. Agencies that would act on behalf of domestic competitors in regard to their foreign competitiveness are directly investing themselves in the market, rather than remediating domestic harms. It is a well-established general principal that remedies should be “tailored to fit the wrong creating the occasion for the remedy”¹² and confined to the “least drastic” alternative.¹³ This necessarily would include

¹⁰ OECD, Background Paper by the Secretariat, supra note 4, at 33.

¹¹ Ginsburg & Wright, supra note 3, at 20.

¹² See U.S. v. Microsoft Corp., 253 F.3d 34, 107 (D.C. Cir. 2001).

¹³ See, e.g., New York v. Microsoft Corp., 224 F. Supp. 2d 76, 100 (D.D.C. 2002), aff’d, 373 F.3d 1199 (D.C. Cir. 2004) (“[e]quitable relief in an antitrust case should not ‘embody harsh measures when less severe ones will do’”) (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 325a (2d ed. 2000)); see also United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 327 (1961) (“if the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result” (emphasis added)).

a restriction on an agency's ability to fashion a remedy that addressed harm to foreign commerce, unless that effect was merely incidental to the remediation of harm to domestic commerce.

20. Accordingly, if a domestic company suffers a purely foreign harm, it cannot look to the domestic antitrust laws for a remedy.¹⁴ To permit such a remedy would create "a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs" and violate the most basic principles of comity.¹⁵

21. Principles of comity seek to prevent a country's laws from supplanting other nations' laws where those other nations may have a stronger interest in regulating conduct within their borders.¹⁶ The principle of comity also applies in cases where a foreign harm is not independent of a domestic harm and even where foreign actions clearly cause domestic harm. In the U.S., for example, courts have recognized that "[a]n effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness."¹⁷ As such, in addition to the compulsory limitations discussed above, there are also discretionary limitations to the application of domestic antitrust laws. Thus, even where extraterritorial jurisdiction or an extraterritorial remedy is permissible, the agencies may properly decline to act in an extraterritorial fashion out of deference for other nations.

4. Importance of Effective Leniency Programs

22. Leniency programs are an important tool for improving the level of compliance with competition laws, thereby increasing competition, lowering prices, improving innovation and service, and creating more efficient business practices. The overall objective of leniency programs, like fines, is to increase compliance with competition laws. Paired with sanctions that are set at an optimal level, leniency programs can help to uncover conspiracies that may otherwise go undetected or prevent the formation of cartels in the first place.¹⁸

23. An optimal sanctions program should include a policy that provides leniency for first applicants, as well as significant discounts for follow-on applicants or cooperators who ultimately acknowledge their anticompetitive conduct. When fines are set at the optimal deterrent level, firms involved in cartels will be incentivized to apply for immunity.¹⁹ ICN "Good Practices" in Anti-Cartel Enforcement call for lenient treatment (something less than full leniency) for cooperating cartel members that follow the first immunity

¹⁴ See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 159, 166 (2004) (finding the exceptions to the FTAIA do not apply where a plaintiff's claim rests solely on a foreign harm that is independent of any U.S. domestic harm.) ("Congress did not seek to forbid any such conduct insofar as it is here relevant, i.e., insofar as it is intertwined with foreign conduct that causes independent foreign harm.").

¹⁵ See *id.* at 165.

¹⁶ See *id.* ("Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?").

¹⁷ *Timberlane Lumber Co., et al v. Bank of America*, 549 F.2d 597, 613 (9th Cir. 1976).

¹⁸ INT'L COMPETITION NETWORK, ANTI-CARTEL ENFORCEMENT MANUAL 2 (May 2009), available at www.internationalcompetitionnetwork.org/uploads/library/doc340.pdf.

¹⁹ See Alberto Heimler & Kirtikumar Mehta, *Violations of Antitrust Provisions: The Optimal Level of Fines for Achieving Deterrence*, 35 *WORLD COMPETITION* 113 (2012).

applicant.²⁰ Heimler and Mehta argue that it is necessary that applicants that follow the initial leniency applicant are also provided with fine reductions, albeit lower reductions than those granted to the first applicant to file for leniency.²¹ Leniency programs that incentivize self-reporting and the sharing of information with competition agencies to enable enforcers to quickly end ongoing anticompetitive behavior are essential to cartel enforcement and a balanced sanctions program.

5. Using Caution in Applying Recidivism Multipliers

24. It is BIAC's experience that companies which have been subject to a competition law investigation are highly motivated to ensure compliance and avoid any recurrence. Once a company has endured such an investigation, it has a clear understanding of all of the serious consequences of an investigation including harm to reputation, diversion of management focus, civil damage consequences and serious disruption of the business. As a result, in BIAC's experience, companies are generally unlikely to re-offend as a deliberate corporate strategy or through institutional recidivism.

25. In some cases, BIAC would note, what appears to be corporate recidivism is not in fact a knowing or reckless repeat offence. BIAC would caution against the excessive application of recidivism multipliers to conduct that is either too distant in time, too close in temporal proximity (for example, occurring in two markets concurrently such that both violations occurred before one could be sanctioned, and thus is not actual recidivism), or conduct occurring in a far-off subsidiary. On occasion, the timing of prosecutions can make concurrent problems, often generated by the same individual or small group of individuals, appear to be recidivism. In other cases, decades and changes of ownership and management may have passed between one violation and another, and may occur in an entirely different division of the business. Recidivism should indeed be punished, but any increase for recidivism should only take place after a careful analysis of relevance, not by the rote application of a multiplying factor.

6. Appropriate Recognition of Genuine Compliance Efforts

26. BIAC is strongly of the opinion that genuine, effective corporate compliance efforts will be strengthened if good faith and reasonable efforts to comply are taken into account as a mitigating factor when sanctions are under consideration. The level and intensity of sanctions should be adjusted to recognize instances where a well-established compliance program is in place, is generally respected, and has helped to detect the infringement or facilitated cooperation.²² If an employee of a company that has made a good faith, reasonable effort to educate and monitor its employees nevertheless violates competition law, the efforts of the company to deter the unlawful conduct should result in a lower fine than would otherwise occur in absence of any compliance program.

27. BIAC is of the view that, for most companies, the strongest driver of compliance with competition law is the desire to conduct business ethically and to establish a reputation for doing so. A company's reputation is seriously damaged by the news that it has violated competition law, and this damage can have significant, lasting consequences to the business, its management and its shareholders. Well-publicized sanctions can be particularly important when competition laws are first introduced to draw attention to the seriousness with which the new laws are to be taken. The publication of sanctions, as well

²⁰ INT'L COMPETITION NETWORK, ANTI-CARTEL ENFORCEMENT MANUAL 5 (April 2011), available at <http://internationalcompetitionnetwork.org/uploads/library/doc834.pdf>.

²¹ See Heimler & Mehta, supra note 19.

²² See OECD, Competition Committee, Promoting Compliance with Competition Law, Note by BIAC, DAF/COMP(2011)20 (June 29, 2011), available at www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf.

as the publication of completed prosecutions, is an important tool in deterring unlawful conduct. The publication of an investigation, on the other hand, can have similarly severe consequences even though the offense has not yet been proven. Agencies should therefore avoid publicizing investigations until sanctions are imposed.

28. Agencies should be encouraged to promote the development and implementation of compliance efforts. Agencies should also consider imposing an obligation to establish or improve existing compliance programs as part of a remedy or settlement arrangement where appropriate. Willingness to cooperate in the process once sanctions have been imposed should also be considered as a mitigating factor when calculating sanctions.

7. The Role of Private Enforcement

29. In general, BIAC would suggest that a primary role should be given to public enforcement in antitrust enforcement systems. Private enforcement should be limited to a compensatory function, rather than a punitive one, to prevent overcompensation. Public enforcement benefits from more effective investigative powers, and has the ability to apply sanctions that are appropriately calculated and proportional to the harm. Public enforcement is also less costly for society than private enforcement.

30. The rapid and advancing state of private actions must be considered when setting optimal fine levels. In jurisdictions that favor litigants, the consequences of private actions can sometimes far outpace public enforcement. It is BIAC's position that employing multiple damages as part of a private antitrust enforcement system creates a serious danger of overcompensation (resulting in an unjustified windfall to private plaintiffs) and excessive punishment (ultimately harming competition and consumers). More recent considerations of the issues by Canada and the EU have reached the appropriate result of measuring damages in private enforcement actions by limiting compensation to proven loss caused by the infringement, not multiple damages. While Canada provides a right of private action similar to the United States' *Clayton Act*, the Canadian private right of action is limited to single damages for actual loss, as opposed to treble damages.²³ Likewise, the EU position of providing for full compensation, but not overcompensation, whether by punitive, multiple, or other forms of additional damages is an appropriate means of providing civil remedies.²⁴

31. The level of private enforcement should be factored into a public authority's thinking when establishing fining levels. Moreover, if civil remedies are newly introduced to a jurisdiction, consideration should be given to the reduction of public fines, because a company may be required to pay both a deterrent fine and, in addition, damages to potential victims, which could lead to a total sanction and transfer of wealth that is disproportionate to the harm caused. Where Jurisdictions have an elevated opportunity for judgments from private damage actions, there should be a countervailing decrease in the amount of public sanctions so as to avoid excessive punishment.

²³ Jason Potts, *The Direct Injury Rule in Canada: An Indirect Analysis*, 34 *CAN. BUS. L.J.* 114, 125 (2001).

²⁴ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, art. 3, 2014 O.J. (L 349) 1.