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SANCTIONS IN ANTITRUST CASES

Summaries of contributions

-- Session IV --

1-2 December 2016

This document reproduces summaries of contributions submitted for Session IV at the 15th Global Forum on Competition on 1-2 December 2016.

*More documentation related to this discussion can be found at
www.oecd.org/competition/globalforum/competition-and-sanctions-in-antitrust-cases.htm*

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SANCTIONS IN ANTITRUST CASES

-- *Summaries of contributions* --

Abstract

This document contains summaries of the various written contributions received for the discussion on Sanctions in Antitrust Cases held during the 15th meeting of the Global Forum on Competition in Paris, France (1-2 December 2016, Session IV). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

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ARGENTINA

Argentina's Competition Act establishes administrative sanctions to be applied in cases of anticompetitive conduct. It contemplates monetary sanctions aiming at punishing those who commit infractions and at dissuading those economic agents from committing future anticompetitive conducts. Fines can be complemented by inactivation sanctions for companies and their directors, managers or other individuals involved in the case. Argentine law, however, does not provide for criminal sanctions for antitrust offenses. Although the law allows fines to be extended to individuals of the companies involved, this prerogative has been used only once.

Act 25,156 does not define a mechanism to calculate the fine based on objective parameters. Neither do CNDC's guidelines. Principles of comparative law have been applied to calculate fines in some cases that the Competition Authority considered to be serious violations of the law. However, this has been done on an ad-hoc basis rather than in a systematic way. According to Act 25,156 the amount of the fine should be linked to the loss suffered by all economic agents due to the prohibited activity; the benefit obtained by all the active parties due to the prohibited activity; and the value of the assets of the parties involved in previous point 2 at the moment that the violation was committed.

Act 25,156 also establishes the maximum fine that can be imposed. This amount, however has not been updated since 1999 and, therefore, it has a very weak dissuasive power. Indeed, while the maximum fine was equivalent to USD 150 million in 1999, today it has come down to USD 10 million. These amounts can be duplicated in case of recidivism. Detection and sanction of hard-core cartels are also difficult because Argentina does not currently have a leniency program.

Argentina's case law has established some aggravating factors, such as the seriousness of the action's consequences, the social sensitiveness of the product market could involved, intention and the acknowledgment of the illicit behavior, the fact that the conduct had mostly impacted on the most vulnerable economic population and recidivism.

Effective collection of the fine can take several years because the parties can appeal the administrative decision before a court of justice. Collection only occurs once the sanction has been confirmed by all judicial instances.

Argentina is currently in the process of discussing a reform to its Competition Act. Regarding sanctions, the bill improves on the current Competition Act in two ways. First, it establishes an upper bound on the amount of fines that will be immune to inflation and, whenever possible, will be associate to the turnover of the firms involved in the illicit act. Second, it creates a leniency program that will facilitate cartel detection and sanction. Criminal sanctions, however, are not included in the bill.

AUSTRALIA

The Australian Competition and Consumer Commission (ACCC) is Australia's competition regulator and is responsible for enforcing the Australian competition laws, set out in the Competition and Consumer Act 2010 (CCA).

The CCA provides for both civil contraventions and criminal offences. In respect of civil contraventions, under the Australian model of competition enforcement, the ACCC investigates breaches of the CCA and, where it considers appropriate, prosecutes civil cases before the Federal Court of Australia for determination of relief.

In respect of cartel conduct (which comprises price fixing; restricting outputs in the production and supply chain; allocating customers, suppliers or territories; and bid rigging), Australia has a parallel regime of civil contraventions and criminal offences. Criminal prosecutions may only be brought by the Commonwealth (federal) Director of Public Prosecutions (CDPP) and the ACCC works with the CDPP in relation to such prosecutions.

The CCA provides for significant civil pecuniary penalties for breaches of the Act: corporations can be fined up to the greater of AUD 10 million, three times the total value of the benefits obtained and reasonably attributable to the conduct, or 10% of their annual turnover attributable to Australia; individuals can be held personally liable for breaches of the Act and are subject to a maximum penalty per contravention of AUD 500,000.

Significant criminal pecuniary penalties for cartel conduct are also available: corporations are subject to the same maximum fines as for civil breaches (see paragraph **Error! Reference source not found.** above); and individuals can be held personally liable and fined up to AUD 360,000 per offence or imprisoned for up to 10 years.

Other forms of relief that can be ordered by the courts include injunctions, orders disqualifying an individual from managing corporations and community service orders.

Australia considers that while punishing firms that engage in cartel behaviour is essential to deterrence, individuals must also be held personally liable for their actions in order to avoid the perception that the threat of sanctions is so remote from the illegal conduct that it constitutes an acceptable risk.

The wide variety of penalty options available to the courts under the CCA gives the courts flexibility, which allows them to impose an appropriate penalty taking into account the particular circumstances of each case.

AUSTRIA*

The Austrian Federal Competition Authority (FCA) has been very active in enforcing antitrust cases. Therefore numbers and amounts of fines have been increasing in particular in the last 10 years, amounting to approximately EUR 190 million in total. In Austria fines are imposed by the Cartel Court upon application by the FCA. The FCA can apply for a maximum fine or for an “appropriate” fine. The courts cannot impose a higher fine than applied by the FCA, but are free to decide if the FCA applies for an “appropriate” fine. In 2002 a decriminalisation of competition law came into effect and criminal sanctions were substituted by the current fining system. However, section 168b of the Criminal Code still provides for up to three years’ imprisonment for collusive tendering (bid-rigging).

BRAZIL

Sanctions constitute an important mechanism for strengthening compliance to antitrust law. Although fines are the most common type of sanctions applied by antitrust authorities, in some cases they do not suffice to deter anticompetitive behavior. While exploring the dissuasive limits of fines, the following paper describes and explores CADE's legal framework for setting fines, presenting the alternatives foreseen in the Brazilian law to deal with anticompetitive behavior.

BULGARIA

The submission evaluates the “*Sanctions in antitrust cases*” topic and their application in Bulgaria. The Commission for Protection of Competition (the CPC) is the independent national authority empowered to impose sanctions/fines on undertakings, associations of undertakings and/or individuals for having infringed the Bulgarian Law on Protection of Competition (the LPC) by engaging in anticompetitive behavior. Articles 100 and 102 of the LPC provide the legal grounds thereof. The nature of the fines (pecuniary sanctions) imposed by the CPC is administrative.

The calculation of the fine is determined on the basis of the *Methodology for setting the amount of fines*. The considerations taken into account include the estimation of the basic amount of the sanction, the assessment of the aggravating or mitigating circumstances and the evaluation of the legal maximum.

The amount of the fine may be modified further under the application of the *Leniency program*.

The Methodology for setting the amount of fines does not take into consideration the “inability to pay”. Nevertheless, once the final decision for imposing a fine enters into force, the undertaking may request the Authority to defer the payment of the fine. It should be indicated that the fine becomes payable only after the final decision has entered into force. A court appeal launched against the decision suspends its entry into force. Under the judicial scrutiny, the court may reduce the amount of the fine.

In Bulgaria there is neither criminal liability for the perpetrators of these infringements, nor a procedure for disqualification of individuals. The pecuniary nature of the sanctioning system may not be efficient in some instances and face some limitations. Therefore, the diversification of the sanctioning tools should be envisaged as a measure for effectively combating antitrust infringements. Some may even argue that among the reasons for lack of leniency applications could be the “*soft*” sanctioning policy, which makes the risk of facing a sanction more preferable over the opportunity to submit a leniency application.

CANADA

Canada's *Competition Act* (Act) sets out the potential sanctions for certain anti-competitive conduct. Canada's Competition Bureau (Bureau) is responsible for the enforcement and administration of the Act. In Canada, only the Competition Tribunal or the courts have the authority to make the final determination as to whether there has been an infringement of the Act and, if so, which sanctions should be imposed.

Amendments to the Act in 2009 strengthened the potential sanctions for certain anti-competitive conduct. Potential sanctions now include administrative monetary penalties for abuse of dominance as well as increased fines (for both companies and individuals) and terms of imprisonment for cartel conduct including price-fixing, market allocation, output restriction, and increased terms of imprisonment for bid-rigging. The Act also provides for a right of private action with respect to conduct that violates the criminal provisions of the Act or that fails to comply with a Tribunal or court order.

The Bureau also encourages voluntary compliance with the Act through the use of alternative case resolution mechanisms and by promoting the use of corporate compliance programs to the business and legal communities.

CHILE *

The Tribunal de Defensa de la Libre Competencia (TDLC or Competition Tribunal) has the authority to impose sanctions concerning antitrust infringements, both on corporate entities –either public or private– and on individuals. Law No.20,945 establishes that cartel infringement is a criminal offence. The 2016 Legal Reform provides for a new criminal sanction on individuals, prohibiting them to act as director or manager of stock corporations, State-owned enterprises or trade as well as professional associations, for a maximum period of ten years (disqualification).

The case-law reveals that the system for determining fines in Chile has the following characteristics: Firstly, it relies on broad legal criteria seeking effective deterrence of anti-competitive practices. Secondly, the TDLC has levied fines on corporate entities and to a lesser extent, on individuals. Thirdly, the TDLC has attempted to rigorously assess the economic benefit (legal profits) obtained from an anti-competitive practice. Fourthly, the proportionality principle is not explicitly provided under the Chilean Competition Act. Fifthly, with regard to mitigating and aggravating circumstances, the Competition Law provides some circumstances as examples. Sixthly, the TDLC can impose remedies or administrative measures as an alternative or complementary to fines.

COSTA RICA *

The General Telecommunications Law N° 8642 in its Article 52 holds that the operation of networks and telecommunications services will be subject to the sectorial competition regime provided in this act. So far, SUTEL has only imposed one sanction in a case of anticompetitive conduct. In May 2015, following a complaint filed by Telefónica de Costa Rica TC, S.A. in 2011, SUTEL imposed a fine of over USD 4 000 000 to Instituto Costarricense de Electricidad (ICE) for margin squeeze. SUTEL has not issued any guidelines or criteria regarding the determination of the amount of fines. The law does not provide for mitigating or aggravating circumstances. No circumstances have been applied in antitrust cases. In our jurisdiction, a parent company can be held jointly liable for antitrust violations committed by its subsidiary. In accordance with Article 148 of the Law 6227, the Council can decide a suspensory effect of the imposed sanction/fine while reviewing the appeal if the sanction/fine can cause a serious damage or if the damages are impossible or difficult to repair. Our jurisdiction does not provide for criminal sanctions against individuals. The Law 8642 does not foresee the use of disqualification orders on individuals for sanctions.

CZECH REPUBLIC*

In the Czech Republic, fines imposed on undertakings by the Czech Competition Authority (CCA) amount to the most common (and practically the only) sanction for breaking the antitrust rules. Apart from fines, the CCA may debar an undertaking from bidding in public procurement tenders, this sanction has however not yet been employed. Conversely, the CCA is not empowered to impose sanctions on individuals. Individuals may be found criminally liable, and ultimately imprisoned, for taking part in a cartel, the CCA is nonetheless not aware of any closed proceedings.

In October 2016, new Fining Guidelines 2016 were published. To a large extent, they are built on the same principles, only the parameters used in order to calculate fines were modified. Under the new guidelines, the fine is still calculated out of the turnover in the relevant market in the last year of the infringement. To decide the exact level of that proportion, it is first necessary to ascertain the general gravity of the infringement; in order to do that, the CCA distinguishes between three categories of infringements: (i) the very serious ones; (ii) serious infringements; and (iii) less serious ones. In the second step, the individual gravity of the infringement is assessed, in particular its effect on competition (potential or actual), extent of this effect, consumer harm etc. The basic fine may be further adjusted in three steps: first, taking into account the mitigating and aggravating circumstances; second, taking into account that the undertaking committed more than one infringement; and finally, comparing the amount of fine thus calculated to the overall turnover of the undertaking and the turnover of goods actually affected by the infringement. In the next step, the amount fine may be reduced if the leniency programme or the settlement procedure applies. In the final step, the CCA must make sure that the fine thus calculated will not exceed the overall turnover of the undertaking concerned, achieved in the year before the fine was imposed by the first instance decision.

EUROPEAN UNION*

The EU enforcement system is an administrative one, built around financial sanctions against "undertakings" and "associations of undertakings", not individuals. The current legal framework of the European Union does not provide for criminal sanctions, and, in particular, custodial sanctions. Article 23(3) of Regulation N°1/2003 provides that in fixing the amount of the fine, regard shall be had both to the gravity and the duration of the infringement.

Point 28 of the 2006 COM Fining Guidelines lists a number of aggravating circumstances which it may take into account. Point 29 of the 2006 COM Fining Guidelines lists a number of mitigating circumstances which it may take into account. There is no explicit time limit for taking into consideration previous infringements. However, the Commission applied an increase for recidivism if the previous infringement decision was adopted not more than 10 years before the new infringement started. Compliance programs should not be perceived by companies as an abstract and formalistic tool for supporting the argument that any fine to be imposed should be reduced if the company is 'caught'.

Once the Commission has determined that a single economic unit exists, ("the undertaking", composed of the parent and one or more of its subsidiaries), it enjoys discretion in deciding which entity(ies) to hold accountable for the infringement: whether only the subsidiary, only the parent, or both companies. Parental liability can have an impact on the calculation of the fine as, when established, it is the total turnover of the parent company which is relevant for the legal maximum fine of ten percent of turnover in the preceding business year.

ITP (Inability to pay) applications can be submitted both before and after the imposition of a fine by decision. The European Courts may alter the amounts of fine imposed by the Commission for a wide variety of reasons: e.g. annulment of the underlying prohibition decision for lack of evidence.

The Commission has a leniency policy which, along with the other detection and investigation tools at the Commission's disposal, proves very successful in fighting cartels. Companies which do not qualify for immunity may benefit from a reduction of fines if they provide evidence that represents "significant added value" to that already in the Commission's possession and have terminated their participation in the cartel.

GEORGIA *

The Competition Agency of Georgia is an independent legal entity of public law, created to enforce the Law on Competition of 2014. The Agency determines fines for anticompetitive conduct according to the Article 33 of Georgian Law on Competition. In calculation of the fine specified in this Article, the losses caused by the violation, duration of violation and severity thereof shall be taken into consideration. Agency on its own initiative started the investigation on Fuel Market (petrol, diesel, kerosene). Concerted practice was proved to the 8 relevant economic agents. They were fined a total of USD 23 275 884.

HUNGARY*

The Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) has the right to determine and impose fines in antitrust cases. The Hungarian Competition Act (Act LVII of 1996 on the Prohibition of unfair and restrictive market practices – Competition Act) provides the legal basis for the GVH to impose fines. In addition, the GVH also applies its Fining Notice when determining the amount of the fine. The Fining Notice entered into force on 1 February 2012, and the last time it was amended was on 2 November 2015. The GVH can only impose administrative fines.

Pursuant to the Fining Notice, the GVH determines the amount of the fine in several steps: The first step is to define the basic amount of the fine which is based on the value of the sales of goods or services to which the infringement relates (taking also into account this way the duration of the infringement). The next step after calculating the basic amount of the fine is the adjustment of the basic amount, taking into account several factors. Further steps of the calculation are the application of the leniency policy and the negotiated settlement (if at all) and the decision on the applicability of fine reduction or payment in instalments. The decision of the GVH can be challenged before the court, which may overrule the decision or change the amount of the fine.

According to a Public Procurement Act provision, a bidder can be excluded by the Public Procurement Authority if two conditions are met. Firstly, if the bidder has infringed Article 11 of the Hungarian Competition Act (or the equivalent provision of the European Union competition law) in a bidding process and this has been established by a definitive and executable decision of the GVH. Secondly, the court or the GVH has imposed a fine on the particular firm.

INDIA*

A modern competition law regime was introduced in India by the enactment of the Competition Act, 2002 ('the Act'). The provisions of the Act relating to anti-competitive agreements and abuse of dominant position were notified on May 20, 2009. Under the current legal framework, sanctions are mainly civil in nature. A number of factors are taken into consideration by the Commission while arriving at the quantum of penalty for the contravention of the Act. These include deterrence, duration of the infringement, affected market, and effect on competition, principle of proportionality, ability to pay and recidivism etc. Once the basic penalty is decided this is adjusted on the basis of aggravating and/or mitigating factors in a particular case.

In the past seven years of the enforcement of the Act, there have been fifty seven (57) cases wherein penalties have been imposed for violation of Section 3 of the Act i.e. anti-competitive agreements. Major sectors in which infringement have been found are Pharma, Automobiles, Insurance, Cement and Media & Entertainment. Under Section 4, for abuse of dominance, the Commission has imposed sanctions for violation in twelve (12) cases. Some of the major sectors in this segment are Real Estate, Stock Exchange, Media and Entertainment, *etc.* Associations in the pharmaceutical sector were found to be indulging in the anti-competitive practice of asking prior approval by the association before appointment of the stockists by pharmaceutical companies. The Commission imposed maximum penalty envisaged under the Act i.e. 10% of their average income.

INDONESIA*

The enforcement of Competition Law is spearheaded by the Commission for Supervision of Business Competition (“KPPU”) by cooperating with the Court, as well as the Police and Public Prosecutor. The KPPU mainly imposes administrative sanctions for violations of Competition Law due to its limited authority as an administrative body. In calculating fines, the KPPU has to limit the amount of fines imposed between IDR 1 billion and IDR 25 million. To calculate the basic starting amount mentioned above, the KPPU will consider (1) the sales value of the goods/services concerned before tax; (2) the level of severity of violation; and (3) the period of violation. After determining the basic starting value, the KPPU will move on to determine the aggravating and mitigating elements. There is indeed a need for the KPPU to enforce the payment of sanctions more rigorously. The draft for the Amendment introduces several new changes, including the increase in penalties from the maximum fine for Competition Law violations from a maximum of IDR 25 billion to a maximum of 30% of the total profit of cartels.

IRELAND*

The CCPC (The Competition and Consumer Protection Commission) does not have any power to adopt prohibition decisions or to make orders, to grant remedies (procedural or structural) including interim relief, or to impose penalties in respect of breaches of Irish or EU competition law. Instead, the Irish courts have sole competence to adopt prohibition decisions, make orders, grant remedies (procedural or structural) including interim relief and impose penalties in respect of breaches of Irish and EU competition law. As a matter of CCPC policy, hardcore cartel activity is typically pursued through criminal proceedings, whereas other breaches of competition law are typically pursued through civil actions.

There are no formal sentencing guidelines in Ireland governing the imposition of fines by the Irish courts for breaches of competition law. The Irish courts have imposed a criminal fine for breach of competition law in only one case since 2010. The CCPC considers that criminal sanctions, particularly those directed at the individual, have a strong deterrent effect and, as such, are appropriate and effective sanctions for the enforcement of hardcore cartel activity, such as price fixing, market sharing or bid rigging. The CCPC considers that civil enforcement procedures are more appropriate for non-hardcore infringements.

The DPP and the CCPC operate a cartel immunity programme (CIP) that provides full immunity from criminal prosecution to the first applicant that successfully complies with the requirements of the CIP.

JAPAN

Administrative measures are taken against enterprises that violate the Antimonopoly Act (hereinafter referred to as the “AMA”) by the Japan Fair Trade Commission and claims for damage against them are filed by local government, additionally, in some vicious and serious cases, very serious sanctions, e.g. criminal sanctions (fine, imprisonment) are imposed.

On the other hand, there are some adjustment provisions on sanctions in order to make such sanctions appropriate for actual facts of the violation and give incentives to enterprises to voluntarily cease the violations.

The surcharge is calculated, under the provisions of the AMA, on the basis of the amount of the sales or purchase amounts of the goods or services in question during the period of the violations (3 years maximum) by multiplying such amounts by calculation rates, while these rates are diverse depending on the type of the conduct in question as well as the operation scales and business categories of the enterprises. For example, as additions of surcharge, if a party that has received an order for surcharge payments, etc., as a result of violations of the provisions of Article 3 of the AMA (private monopolization or unreasonable restraint of trade) commits another violation of Article 3 of the AMA within 10 years and becomes subject to surcharge payment orders, the calculation rates of surcharge shall be increased by 50%. As reductions of surcharge, in case the enterprise ceases the violation by the day at least one month prior to the investigation start date, the surcharge is calculated based on the rates which are reduced by 20% from basic calculation rate.

KOREA

Measures against the violation of Korea's Monopoly Regulation and Fair Trade Act (Hereinafter the "MRFTA") are mainly taken in three ways: administrative sanctions, civil remedies and criminal sanctions. Among them, administrative sanctions are currently the main means of enforcing competition law in Korea, and criminal punishment is complementarily used. This is largely due to the uniqueness of the competition cases that the illegality is not simply determined by the exterior side of the act. Among many types of administrative sanctions, penalty surcharge system is widely used as the main method of enforcement to deter the violation of enterprisers and prevent the recurrence.

A penalty surcharge is a monetary penalty imposed in case of violation or non-compliance of certain administrative duties. Imposing surcharges based on the MRFTA shares the characteristics of administrative sanctions and retrieval of undue profits. Penalty surcharges are imposed on enterpriser or enterprisers' organization. The process of determining the penalty surcharges is as follows: Decision of whether to impose penalty surcharges → Decision of calculation criterion by types of violation → First adjustment → Second adjustment → Decision of the amount of penalty surcharges. In this process, the amount may mitigate or aggravate depending on the contents, period, frequency of the violation and the ability to pay by the violator.

The penalty surcharges determined after this process shall once again be adjusted one last time depending on the acknowledgement of leniency applicants. Leniency Program adopted in 1996 induces cooperation of the insiders by providing benefits such as surcharge reduction. The first applicant acknowledged to have met the conditions shall totally be immune from surcharges, and second applicant will be imposed of 50% reduced surcharges. The Leniency Program has taken roots as the most important and effective method of detecting cartels.

Enterpriser may appeal to paying penalty surcharges by filing an objection and administrative suit. If the enterpriser wins the case, the court cancels the imposition order, and the KFTC recalculates surcharges based on the court ruling and reorders the enterpriser to pay adjusted surcharges.

Recently, sanctions other than penalty surcharges are under an active discussion. There are criminal punishments that are being utilized relatively more actively compared to competition authorities in other countries. In particular, not only an enterpriser, but an individual who violated the law shall be subject to criminal punishment. In case of bid rigging, the number of cases where complaints are filed against individuals is on the increase. Secondly, civil suit is when the victim is claiming for damages of any damage or loss arisen from the violation of the law. It is meaningful in that it allows a victim to be directly compensated and moreover, that it indirectly deters the violation of the law. However, the use of damage compensation is still very low, and regarding the strengthening consumer rights, issues such as implementation of class action and punitive damages are under discussion.

LITHUANIA

For violations of antitrust rules undertakings and individuals can face sanctions which are of administrative nature. Criminal liability is not foreseen. In civil cases the plaintiff can pursue damages, but the court cannot impose sanctions on the defendant.

Fines for undertakings can reach up to 10 percent of the gross annual income in the preceding business year. An individual (CEO) could also face liability for his/her company's antitrust infringements (disqualification from three to five years and also a fine of up to EUR 14 481 (in addition to disqualification)).

The proportionality principle for determining fines is explicitly stated in the Law on Competition and is applied in practice.

The Law on Competition foresees several mitigating and aggravating circumstances. The most frequently applied mitigating circumstance has been acknowledgement of material circumstances established by the Competition Council in the course of investigation. The most frequently established aggravating circumstance has been recidivism.

Concerning inability to pay as a mitigating circumstance, the Law on Competition foresees that serious financial difficulties of the undertaking can be considered as a mitigating circumstance.

In Lithuania it is possible to hold a parent company liable for antitrust violations committed by its subsidiaries in certain cases.

Persons can appeal a decision whereby fines are imposed for competition law infringements. The national administrative courts (both the court of first instance and the court of appeal) have a wide jurisdiction regarding fining issues and can recalculate the amount of the fine imposed.

The leniency programme in Lithuania offers full immunity (or fine reduction in certain cases) to the first applicant, and reductions of fines for subsequent applicants (50-20 percent of the imposed fines). Leniency is also available for the CEO of the undertaking which infringed the Law on Competition of the Republic of Lithuania if the undertaking receives immunity from fines.

Private enforcement is not yet very common in Lithuania although in the last years there have already been several cases. Neither sanctions nor leniency prevent private damages actions.

In general, there is no difference between bid rigging cases and other forms of hard core cartels in terms of adopting sanctions.

MEXICO COFECE*

On July 7, 2014, a new Federal Economic Competition Law (FECL or competition law) came into force. Derived from the constitutional amendments to article 28, major changes were introduced into the Mexican competition law system. COFECE may enforce administrative sanctions and fines (Article 127 of the FECL) and criminal sanctions (Article 254 bis and 254 bis 1 of the Mexican Federal Criminal Code) for infringements to the Competition Law. The Constitutional reform has also provided a new framework for the judicial process in competition matters. Fines can only be executed (or collected) when the appeal trial has ended, and the resolution is favourable to the Commission. The 2013 constitutional reforms on economic competition and the new Competition Law granted the COFECE with new powers. In accordance to these new powers, the Mexican Federal Criminal Code was also amended.

MEXICO IFT

The Federal Law of Economic Competition (FECL) empowers the Federal Telecommunications Institute to impose remedies to mergers in order to preserve benefits and prevent harmful effects, to monitor their effective compliance, and to sanction non-compliances.

In 2015, Mexican Specialized Courts for Economic Competition, Broadcasting and Telecommunications adopted a criterion that strengthened the powers of the authority to enforce merger remedies. They resolved that remedies are not only a list of specific acts or conducts mandatory to the merged party, but also they seek a specific outcome in the market, thus the behavior of the merged entity has to comply with the purpose defined by the authority. This resolution improves the accountability on the remedies and makes its enforcement more flexible and less costly for the authority.

The criterion given by the Court has likely made behavioral remedies more enforceable by linking them to the fulfillment of their objectives. Remedies will satisfy the principle *nulla poena sine lege*, as long as the rules and the objectives are clearly stated.

Additionally, the criteria will likely prevent anticompetitive conducts that contradict the purpose of the remedies. Transgressors will be subject to a “non-compliance procedure”, which is faster than an investigation procedure.

THE NETHERLANDS*

All of ACM's enforcement activities take place within the Dutch administrative law system and decisions of ACM may be challenged before the administrative courts. Fines are a very important instrument mainly because of their deterrent effect. The Dutch Competition Act of 1998 was amended in 2007 to allow for the sanctioning of individuals for competition law infringements, such as issuing instructions or exercising de facto leadership with regard to antitrust violations. As a result of the 2007 amendment, ACM may impose administrative fines on specific (groups of) companies, associations and on specific individuals who participated in the infringement. The method of fine calculation has remained the same over the last 15 years. There have only been some minor changes in the definition of relevant turnover. ACM has discretionary powers as to whether it will fine the subsidiary and/or the parent undertaking. In its determination of fines, ACM takes into account possible aggravating and mitigating circumstances. ACM decisions applying Community and national competition law are subject to a three-stage appeals process. In addition to the imposition of fines, ACM can also issue companies with a cease and desist order to bring an infringement to an end.

PAKISTAN*

The Competition Commission of Pakistan (the Commission) is an autonomous quasi-judicial and quasi-regulatory body primarily vested with civil and administrative jurisdiction. While imposing financial penalties, the Commission pursues two-fold objectives: to deter undertakings from anti-competitive practices, and to reflect the seriousness of the infringement. To achieve effective deterrence and other objectives of competition law, the Commission frequently takes into account mitigating and aggravating factors on a case-by-case basis.

In most of the cases, the Commission's orders are challenged before the CAT and before the superior Courts of Pakistan. Since its inception in 2007, the Commission has imposed financial penalties amounting to PRK 26.621 billion and has recovered PKR 23.750 million only. The main reason for non-recovery of the fines is that majority of the Commission's orders are pending before the CAT or the Superior Courts of Pakistan.

In addition to fines, the Commission in the exercise of its administrative jurisdiction can pass multiple directions to the undertakings found guilty of violations of the Chapter II prohibitions. The competition law of Pakistan does not provide for disqualification order for individuals such as directors and senior management of an undertaking.

PERU

The Section 1 of the Peruvian Competition Act prohibits and penalizes the anticompetitive behavior with aiming at promoting economic efficiency in the markets for the welfare of consumers. This contribution on sanctions in Competition Law enforcement is addressed at showing how fines and correctives measures are imposed in order to deter and combat anticompetitive conducts to restore competition in the markets. In that context, first, general rules to determine fines will be referring, applying legal criteria to establish specific fines. Thereby, the observation of the proportionality principle will be treated and how this principle could affect the determination of sanctions, observing the main rights of the investigated parties.

On the other hand in Peru, not only monetary sanctions could be imposed but also non-monetary sanctions are good tools used at reversing the effects of the infringement and restoring competition in the affected markets. So, Indecopi will show with examples how corrective measures were applied in the past to accomplish the goal mentioned.

Finally, being conscious about the importance of leniency programs around the world due to focusing especially on detection and prosecution of cartels, and provided that hard core cartels are almost universally considered illegal¹, Indecopi will refer about the benefits for leniency applicants, amendments recently introduced in the Peruvian Competition Law. For all above mentioned, the purpose of the contribution is not only to reaffirm that the repression of hard core cartels among competitors is a priority for the Commission and its Technical Secretariat but also to inform about the criteria to determine sanctions of anticompetitive behaviors.

¹ “(...) hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others”. The Organization for Economic Co-operation and Development underlined. Available at: <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=193>

In the same vein, the International Competition Network has mentioned «Secret cartel agreements are a direct assault on the principles of competition and are universally recognized as the most harmful of all types of anticompetitive conduct. Any debate as to whether cartel conduct should be prohibited has been resolved, as the prohibition against cartels is now an almost universal component of competition laws». ICN Working Group on Cartels, Defining Hard Core Cartel Conduct. Effective Institutions. Effectives Penalties, Building Blocks for Effective Anti-Cartel Regimes vol. 1, ICN 4th Annual Conference, Bonn, 2005, p. 5. Available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf>

PORTUGAL*

The Portuguese Competition Authority may impose fines on companies and individuals when they infringe the Portuguese Competition Act (the Act). In addition, the Portuguese Competition Authority may impose ancillary sanctions, when the seriousness of the infringement and the fault of the party concerned so justifies. The Portuguese Competition Act establishes the upper limit of the fines and foresees the main factors to take into account when determining the fine's amount. The basic amount is determined by reference to the value of sales of goods (or services) to which the infringement relates. Depending on the gravity of the infringement, the Portuguese Competition Authority establishes a percentage (up to 30%) of the value of sales to take into consideration. The basic amount will be adjusted upwards or downwards depending on the aggravating or mitigating circumstances. As a third step, this adjusted amount may be revised upwards in order to ensure deterrence, where the company has significant market power and financial resources, or where it is necessary to exceed the gains improperly made as a result of the infringement, or/and the affected market is of particular economic relevance.

ROMANIA*

RCC (the Romanian Competition Council) may impose, by decision, administrative fines on undertakings and associations of undertakings for breaches of the competition rules. Pursuant to Article 55 of the Competition Law, RCC may by decision impose fines between 0.5% and 10% of the aggregate turnover from the financial year prior to the sanctioning on undertakings and associations of undertakings.

The gravity and the duration of an infringement, taken together, determine the basic amount of the fine. The basic amount is adjusted further by considering aggravating and mitigating circumstances. When determining the amount of the fine RCC applies its Guidelines on the method of setting fines. These Guidelines were first adopted in 2004, then amended in 2010 to reflect the European guidelines and in 2016 to comply with the settlement provisions of the law. As a rule, according to the Guidelines, the basic level can be increased or decreased by 5% to 10% for each aggravating or mitigating circumstance retained. Inability to pay (“ITP”) is not referred to specifically in the Competition Law but can be taken into account when calculating the fine. The amount of the fine may be further reduced if the leniency programme or the settlement procedure applies. The Court may impose, upon request, the suspension of execution of the appealed decision. In case of fines, the suspension will be applied solely provided that a bail is paid according to provisions laid down by the Fiscal Procedure Code.

RUSSIAN FEDERATION*

Sanctions against the violators of the antimonopoly legislation are applied in accordance with the Law on Protection of Competition, the Code of Administrative Offences and the Criminal Code. The Russian antimonopoly legislation provides 8 types of punishment including fines and disqualification. In cases considered by the FAS Russia its Commission may issue acts, including conclusion on the circumstances of the case, warnings, rulings, decisions or prescriptions. As punishment, provided the Code on Administrative Offences, in cases of violation of antitrust legislation may also apply fines and disqualification. The Criminal Code provides liability for the prevention, restriction or elimination of competition done through the conclusion of a cartel by economic entities.

The FAS Russia's commitment to imposing heavy fines on large companies for the abuse of dominant position is confirmed by the authority's experience in the suppression of offenses on the energy market. Over the period from 2008 to 2011, the largest vertically integrated oil companies have been accused of violating Article 10 of the Law on Protection of Competition, and were forced to transfer to the federal budget RUB 19.4 billion.

SERBIA*

In the field of competition policy, the punishment of “perpetrators” mostly relates to imposing monetary fines. According to the Regulation, there are seven criteria for determining the amount of a fine, including that infringement of competition has been committed intentionally. The first phase: setting the initial amount (by multiplying the baseline with specific factor in reference to the gravity of infringement and thereupon, the specific factor regarding the duration of infringement). The infringement gravity related factor is set in the range from 1-3, referring to less serious, serious or most serious competition infringements. The second phase: implies adjustment of initial amount by applying specific factors regarding mitigating and aggravating circumstances. In addition to penalties prescribed by the Law on Protection of Competition, domestic legislation defines other sanctions for competition infringements such as abuse of dominant position and misfeasance in public procurement. The Public Procurement Law envisages creation of so called “black list” for infringement of competition in public procurements, which means that organisation authorised for protection of competition may ban a bidder from participating in public procurement procedure when bidder’s violation of competition rules in public procurement procedure is determined, pursuant to competition protection law provisions.

SLOVAK REPUBLIC*

The Antimonopoly Office of the Slovak Republic (the AMO) has power to impose fines for the infringements of competition law, which are of an administrative nature. It is also possible to impose criminal sanctions on natural persons, but only in criminal proceedings. The Guidelines provide methodology of setting fines, which is based on the criterion of relevant turnover. The Act on Protection of Competition provides basic overview of aggravating and mitigating circumstances that could be taken into account in the process of setting fines. When it comes to the inability to pay (ITP) applications, the AMO has only limited experience in this regard. The AMO decides on cases on the basis of a two instance system. The executive division (Division of the Abuse of Dominant Position and Vertical Agreements or Cartel Division) of the AMO decides on the case in the first instance. This decision may then be reviewed by the Council of the AMO upon an appeal. The AMO is basically responsible for the collection of fines. In case the undertaking does not comply with the obligation to pay the fine, the AMO has to enforce the decision. As from April 2016, the AMO has the obligation to impose a ban from participation in future public procurements on companies that took part in bid rigging activities.

SOUTH AFRICA*

The South African Competition law provides for the imposition of administrative penalties or fines by the Competition Tribunal (the Tribunal), which is responsible for adjudicating anti-competitive conduct. Penalties worth USD232 410 225 have been imposed between 2011 and 2016.

When determining an appropriate penalty, the Competition Tribunal must consider several following factors, including the nature, duration, gravity and extent of the contravention. In terms of the Commission's guidelines, and in line with the Tribunal's six-step approach, the Commission follows the following steps: (Step 1) determine the affected turnover in the base year; (Step 2) calculate the base amount being that proportion of the affected turnover relied upon; (Step 3) multiply the amount obtained in step 2 by the duration of the contravention; (Step 4): round off the figure obtained in step 3 if it exceeds the cap provided for by section 59(2) of the Competition Act; (Step 5): consider factors that might mitigate and/or aggravate the amount reached in step 4, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it; and (Step 6) round off this amount if it exceeds the cap provided for in section 59(2) of the Act.

The base amount is calculated as a proportion of the affected turnover on a scale from zero percent (0%) to thirty per cent (30%). Duration of the firm's participation in the contravention is also a factor that must be taken into consideration in the determination of a fine. Once the base amount has been determined and multiplied by the duration, it is decreased or increased by a percentage that depends on the balance of mitigating or aggravating factors. The fact that a firm has a compliance programme and still engaged in a prohibited practice should, in the Commission's view, be regarded as an aggravating factor.

The Commission has a leniency programme, the Corporate Leniency Policy (CLP), which was initially developed in 2004 and amended in 2008. The CLP has been an effective tool in detecting and fighting cartel conduct.

The South African competition authorities may also consider alternative remedies apart from fines, private enforcement by members of the public or criminal sanctions. Recently, on 1 May 2016, the provisions of section 73A, which introduce criminal sanctions for cartel conduct, came into effect. These provisions criminalise the conduct of a director or a person having management authority, who has caused or permitted a firm to engage in cartel conduct.

SWEDEN

Swedish competition law can sanction companies with administrative fines for violating the prohibitions against anti-competitive agreements and abuse of a dominant position. Individuals who have violated these rules on behalf of the companies that they represent can be prohibited from trading. Moreover, the Swedish regime contains rules on damages as a remedy for breaches of the competition rules.

The Swedish Competition Authority (“the SCA”) cannot itself impose fines but must make a request to the courts for the imposition of a proposed fine. The SCA has adopted a memorandum which explains how it calculates fines. An additional feature of the Swedish system is that the SCA applies a leniency program which, if applicable, may have an effect on the level of fines imposed on companies in breach of competition law.

This contribution considers, with references to relevant case-law where applicable, the above-mentioned aspects of Swedish competition law. Section 2 describes the legal basis for imposing fines as well as the relationship between the SCA and the courts. In sections 3 and 4, a detailed account is given of how the SCA determines the basic fine and the circumstances that can lead to an adjustment of the fine. Some practical issues in determining the amount of fines are discussed in section 5. Finally, section 6 concerns other forms of sanctions, including damages, trading prohibitions and exclusions from public procurement procedures.

SWITZERLAND*

Sanctions under Swiss competition law are administrative sanctions (CartA, Art. 49a, para. 1) imposed on businesses i.e. almost always legal persons. The amount of the sanction is dependent on the duration and severity of the unlawful behaviour. Due account is also taken of the likely profit that resulted from the unlawful behaviour. The starting point for calculating the sanction is the basic amount (CASO, Art. 3), which amounts to a maximum of 10 per cent of the turnover achieved in the relevant markets in Switzerland during the preceding three financial years. The basic amount depends on the definition of the relevant market. The ordinance sets out increases to the basic amount according to the duration of the infringement of competition. Articles 5 and 6 of the ordinance contain examples of mitigating circumstances (e.g. a strictly passive role in the restraint of competition) and aggravating circumstances (e.g. repeated infringements of the Cartel Act, an instigating role in the infringement). The most common mitigating circumstance accepted by COMCO is the approval of an amicable settlement under Article 29 of the Cartel Act. An amicable settlement is seen as a form of additional co-operation with the authority, over and above the legal commitments of the undertaking.

A suggestion was made to reform the penalty system as part of the CartA review launched in 2010. The introduction of sanctions for natural persons responsible for violations was recommended in 2009, in addition to the administrative penalties, in the progress report based on CartA Article 59a. Since the CartA review was rejected by Parliament in 2014, the system of sanctions has been left untouched. Ultimately, the priorities for cartel law must remain deterrence and penalising undertakings, while sanctions against natural persons may, if considered appropriate, constitute a further penalty on top of those incurred by the undertaking.

CHINESE TAIPEI*

Under Paragraph 1, Article 40 of the FTA, the FTC can impose an administrative fine on infringements, ranging from a minimum of NT\$ 100,000 up to NT\$ 50 million (approximately equivalent to US\$ 3,175 to US\$ 1,587,300). Criminal prosecution is possible, but only for failure to comply with the FTC's cease and desist order, or a repeat offender. The main legal basis for the FTC to determine the amounts of fines are the Administrative Penalty Act, Enforcement Rules and the "Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Fair Trade Act (Regulations for calculation of fines)". Regulations for calculation of fines provide aggravating and mitigating circumstances that could be taken into account in the process of setting fines.

In March 2013, the FTC fined nine independent power producers (IPPs) for concerted action. This was the first case after the 2012 FTA amendment increased the administrative fine up to 10% of the total sales income in the previous fiscal year for those serious violations. The IPPs filed the third appeal to the Executive Yuan for the FTC's decision on fines. Given that the substantial parts of the case (i.e., whether the alleged conduct constituted the concerted actions or not) are still under review by the Administrative Court.

TURKEY*

Turkish Competition Authority (TCA) is an autonomous administrative body which only imposes administrative fines for the infringement of Turkish Competition Act (Act). Individuals (managers or employees of fined undertakings) shall also be fined if they are determined to have a decisive influence in the infringement. TCA takes into consideration issues when deciding on the amount of the fine, including the repetition of infringement and its duration. In order to ensure transparency, objectivity, consistency and deterrence in fining process and to manage and promote undertakings' assistance with examinations and active cooperation, TCA has also prepared the Regulation on Fines (Regulation) in 2009. The base fine is determined based on market power of undertakings and gravity of the damage caused by the violation. Article 6 and Article 7 of the Regulation, provides a method for aggravating and mitigating factors. Aggravating factors are applied before mitigating factors. During the 2005 – 2015 period, TCA had concluded 161 investigations. The last paragraph of Article 16 of the Act provide legal basis for leniency. Regulation on Active Cooperation for Detecting Cartels (Active Cooperation/Leniency Regulation) is the secondary legislation that defines the procedure and provides principles for leniency system in Turkey. Specifically, the first undertaking which apply for leniency before the TCA carry out a preliminary inquiry and meet requirements, shall be granted full immunity from fines.

UKRAINE*

Antimonopoly Committee of Ukraine (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; and 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.

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 first fines guideline 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. 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 AMCU's decision doesn't have a power of enforcement document in terms of fines collection. The necessity of state duty payment by AMCU for application to the court may be itself an obstacle due to budget constraints. 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.

UNITED KINGDOM

In the United Kingdom, the Competition Act 1998 gives the Competition and Markets Authority (CMA) powers to apply, investigate and enforce the Chapter I and Chapter II prohibitions of the Competition Act 1998 as well as Article 101 and Article 102 of the Treaty on the Functioning of the European Union. Subject to certain exceptions, the CMA can impose financial penalties on undertakings that intentionally or negligently infringe any of these prohibitions.

The CMA, along with the Serious Fraud Office is also responsible for bringing criminal proceedings against individuals who commit the cartel offence. A conviction can result in an individual being imprisoned for up to five years and/or a fine.

In certain circumstances, the CMA has the power to apply to the court for a Competition Disqualification Order against a director of a company that has infringed competition law: such orders are part of the wider director disqualification regime, whose primary purpose is to protect the public from unfit directors.

In addition, anyone who has suffered harm caused by an infringement of the competition provision can seek compensation for that harm by bringing an action in the civil courts. As such, private actions will not lead to penal sanctions for infringing undertakings, but an infringing business might be liable to pay civil damages.

UNITED STATES

In the U.S., federal antitrust sanctions are used almost exclusively against hard-core cartel activity, which is a crime. Companies are fined when criminally convicted of price fixing, bid rigging, customer allocation, or market allocation. Individual accountability is a cornerstone of effective cartel enforcement, and the principal cartel deterrent is threat of imprisonment for culpable individuals. The Sherman Act specifies maximum fines of \$100 million for corporations, but fines of up to \$500 million have been imposed under a statute that allows fines of up to twice the gross gain or loss from the offense. Federal sentencing guidelines govern the calculation of fines and jail sentences. A “base fine” for a company is calculated, using 20 percent of the affected commerce as a proxy for the loss, then calculating a fine range using multipliers based on a combination of factors.

BIAC*

Fines are an appropriate remedy for hard core cartel activity such as naked horizontal price fixing, bid rigging, and market allocation. 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. 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 behaviour as the principle of proportionality must also be respected.

BIAC supports the majority of jurisdictions which use relevant turnover, rather than global turnover, as the basis for calculation of the fine. Fines should be limited for companies struggling financially. 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. BIAC agrees that holding responsible individuals accountable for hard-core cartel infringements would further the deterrent objectives of competition law enforcement.

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. Sanctions and remedies should be constrained to matters where the conduct has caused domestic consumer injury.

An optimal sanctions program should include a policy that provides leniency for first applicants, as well as significant discounts for follow-on applicants or co-operators who ultimately acknowledge their anticompetitive conduct. 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.