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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session I: Cartels: Estimation of Harm in Public Enforcement Actions

-- Contribution from the United States --

4-5 April 2017, Managua, Nicaragua

The attached document from the United States is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.

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

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



15th Latin American and Caribbean Competition Forum
4-5 APRIL 2017, Managua, Nicaragua

Session I: Cartels: Estimation of Harm in Public Enforcement Actions

-- CONTRIBUTION FROM THE UNITED STATES --

1. This paper responds to a request for contributions on the topic of “Cartels: Estimation of Harm in Public Enforcement Actions.”¹ It explains what constitutes hard core cartel activity and the need for serious fines to deter this conduct. It then discusses data availability difficulties in determining fines, and the rationale behind the approach of the Antitrust Division of the U.S. Department of Justice (“Antitrust Division”).

1. Hard-Core Cartel Activity Is a Serious Crime

2. Cartel activity is a type of cooperation among competitors that agree as to the material terms on which they compete, e.g., the prices they charge, or as to whether they compete at all in particular places or for particular customers. Rigging bids, fixing prices, and allocating customers and markets are typical examples of cartel activity.

3. With cartel activity, the agreement among competitors is not part of a larger cooperative venture in which the competitors integrate their activities in a manner reasonably expected to generate efficiencies or otherwise benefit consumers. Instead, cartel activity has no legitimate purposes and serves only to rob consumers of the tangible blessings of competition.

4. In the United States, participation in a cartel is viewed as a serious property crime, akin to burglary or larceny, and it is treated accordingly. Like other serious crimes, cartels are never socially desirable, and U.S. law therefore seeks to deter cartels completely rather than impose a modest tax on the conduct. Corporations that participate in cartels are subject both to criminal fines and civil actions for damages, and culpable individuals are subject to criminal prosecution and imprisonment. Typically,

¹ The information for this paper is drawn from previously published papers. For further reading, see Gregory Werden, Scott Hammond, and Belinda Barnett, “Deterrence and Detection of Cartels: Using All the Tools and Sanctions,” 56 Antitrust Bulletin 207 (2011), available at <https://www.justice.gov/atr/file/518936/download>, and Gregory Werden “Sanctioning Cartel Activity: Let the Punishment Fit the Crime,” 5 European Competition Journal 19 (2009), available at <https://www.justice.gov/atr/sanctioning-cartel-activity-let-punishment-fit-crime>.

multiple individuals associated with each corporate cartel participant are prosecuted, and prison terms as long as five years have been imposed.²

2. Straight-forward Proxies Preferred in Determining Corporate Fines³

5. Corporate fines for cartel offenses are governed by the U.S. Sentencing Guidelines. The Sentencing Guidelines provide advisory sentencing ranges which courts must consider in imposing sentence.

6. In formulating the Guidelines, the United States Sentencing Commission believed that fines for economic crimes should be closely related to the resulting gain to the perpetrators or the resulting loss to the victims. However, the Commission also appreciated that determining gain or loss can be enormously difficult, and that requiring this evidence could seriously undermine the efficiency of the legal system. Requiring calculations of gain or loss may provide an opportunity for those engaging in cartel activity to escape serious sanctions simply as a consequence of difficulties in the gain/loss estimation, and the deterrent effect of sanctions could be greatly undermined as a result.

7. Calculating gain/loss often is extremely difficult because it entails the complicated exercise of determining the “but for” world—that is, what would prices have been absent the conspiracy. It is frequently possible to observe prices before and after the conspiracy, but enforcers often lack precise information about when a conspiracy began or ended. Moreover, while economists may try to control for changes in costs and demand over time, this is no easy effort, and opposing experts typically end up far apart in estimating the price effects of cartels.

8. Instead of requiring complex estimations of gain/loss, corporate fines for cartel offenses should be keyed to a proxy for offense severity that can be used with minimal difficulty. The best proxy, and the proxy adopted by the U.S. Sentencing Guidelines, is the volume of commerce for goods or services affected by the cartel during its period of operation. As a special instruction for corporations engaged in cartel offenses, Sentencing Guideline 2R1.1(d)(1) provides that the Base Fine to be used as the proxy for loss is “20 percent of the affected volume of commerce.”

9. The U.S. Sentencing Guidelines have special provisions to account for special circumstances, including cases in which the affected volume of commerce for a particular cartel participant is zero (for example, when that participant agrees not to sell at all). The Guidelines separately address how to determine the Base Fine in a bid-rigging conspiracy for a company that submitted “one or more complementary bids” (i.e., bids intended only to create an appearance of competition). Here, the Guidelines specify the use of the greater of the company’s actual sales or “the largest contract on which the organization submitted a complementary bid.”⁴ The U.S. Sentencing Guidelines also specifically account for additional factors affecting the appropriate sentence, and judges may depart from the Guidelines in the interests of justice.

² The scope of this paper is limited to discussion of fines. See the sources listed above for a more complete discussion of the larger arsenal of enforcement tools, including imprisonment.

³ A detailed description of how corporate fines are determined in the United States is *available at* [https://one.oecd.org/document/DAF/COMP/GF/WD\(2016\)72/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2016)72/en/pdf).

⁴ U.S. Sentencing Guidelines Manual, §2R1.1(d)(3), *available at* <http://www.ussc.gov/guidelines>.

3. Impact of Private Damages on Public Enforcement Actions

10. One important tool for cartel deterrence in the United States is the civil action for damages brought by, or on behalf of, victims of the cartel. Nearly every international and major domestic U.S. cartel prosecution is accompanied by one or more private civil damages action. This has been true for many years. These actions secure substantial recoveries for victims of cartel activity and contribute significantly to cartel deterrence.

11. The corresponding sanctions on cartel participants from civil enforcement actions is liability for overcharges. Plaintiffs successful in antitrust damages actions are awarded both three times the damages found and attorneys' fees.

12. When a company asserts limited ability to pay, it must open its financial books to the Division. The Division does not seek a fine that a company cannot pay, although sometimes the fine recommended cannot be paid immediately, and is instead paid in installments over a period of up to five years. The Sentencing Guidelines provide that a court may order the payment of a fine in installments if the corporate defendant is financially unable to pay the fine upon sentencing or if such payment would be an undue burden, and a court may reduce a fine to the extent that a fine in the Sentencing Guidelines range "would impair [the company's] ability to make restitution to victims" or if the company "is not able and, even with . . . a reasonable installment schedule, is not likely to become able to pay the minimum [Guidelines] fine."⁵

⁵ See U.S. Sentencing Guidelines Manual, §§8C3.2(b), 8C3.3(a)-(b).