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Fining Methodologies for Competition Law Infringements****- Background Note -****24-25 September 2019, San Pedro Sula, Honduras**

This document was prepared by the OECD Secretariat to serve as a background note for the discussion on *Fining Methodologies for Competition Law Infringements* that will take place at the Latin American and Caribbean Competition Forum on 24-25 September 2019.

The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

More documentation related to this discussion can be found at oe.cd/lacfc.

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Latin American and Caribbean Competition Forum

Session I:

Fining Methodologies for Competition Law Infringements

– Background Note by the Secretariat –*

Fines for competition law infringements are one of the most important tools available to competition authorities in their efforts to effectively promote compliance with competition law. Authorities around the world have imposed increasingly substantial fines for competition law violations over the last few decades. Several common steps are observed in setting fines: (i) determination of base fine; (ii) adjustment of the base fine for aggravating and mitigating circumstances; (iii) additional adjustments related to statutory limits and financial capability of the offender; and (iv) considerations of leniency programmes. A majority of competition authorities refer to the relevant turnover as the basis for the calculation of the fine while other authorities calculate basic fine to be imposed with reference to the global turnover. In determining the amount of fines, most competition authorities take into account aggravating or mitigating circumstances, including: recidivism; the role of the undertaking in the infringement; co-operation with the investigating authorities; and existence of a compliance programme. To ensure the principle of proportionality, a number of jurisdictions institute a maximum fining cap and take the financial capability of the undertakings into consideration. In cartel cases, leniency programmes may be considered, if applicable. Despite these divergences, it is widely accepted that adoption and publication of guidelines that detail the fining methodology of a jurisdiction brings positive effects.

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1. Introduction

1. Competition law offenders are often subject to fines (civil, administrative or criminal) because of breaches of the competition law.¹ Fines impose a cost on those companies or individuals for engaging in anticompetitive conduct. Fines can also have a deterrent effect by making unlawful conduct less profitable. Breaking competition laws is profitable if it goes undetected or if the fine is set at a level well below the gains from the conduct. From the perspective of a pure profit-maximising company, it will not violate the law if the expected monetary sanctions are greater than the expected illegal gain (OECD, 2016a).

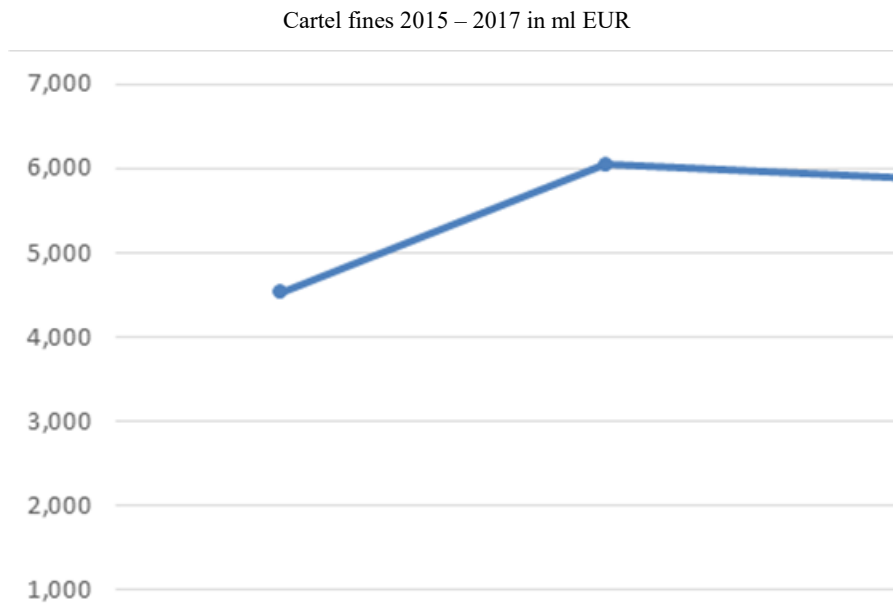
2. Fines act as a deterrent because the possibility of a fine enters into the decision-making process of managers and undertakings in their consideration of whether or not to violate the law. While normative commitment to follow the law has a strong impact on compliance with the law, a calculating manager not bound by such moral values might focus exclusively on profit making (Jackson et al, 2012). Such a manager would determine whether to participate in an illegal activity by comparing the expected illicit gains to the expected cost of punishment (Wils, 2008). If the amount of fines sufficiently exceeds illicit gains, offences can be deterred even when the probability of paying a fine is low.

3. Over the last 25 years, the size of fines for cartels² has increased substantially reflecting the consensus that price-fixing, limitation of production, and market allocation are serious antitrust offenses to be severely punished (Boyer et al, 2017). Taking a sample of 43 countries worldwide, the OECD Compstats internal database indicates total cartel fines of EUR 4.5 billion in 2015, EUR 6.0 billion in 2016 and EUR 5.8 billion in 2017.³ While a small dip occurred in 2017, the data leads to the conclusion of a slow upward trend in the size of fines.

4. In the European Union, the total fines imposed at the EU level for cartel violations adjusted for Court judgments, rose from EUR 344 million in the 1990-94 period to EUR 8.3 billion during 2015-2019.⁴ More specifically, five out of the ten largest individual fines were imposed in 2016 and 2017.⁵

5. Competition authorities in Africa, Asia and Latin America have made rapid progress in fining cartels. One recent report, asserted that authorities outside of Europe and the United States now accounted for half of all the world's announced antitrust fines with Brazil, China, India, Korea and some smaller jurisdictions taking the lead (Connor, 2016).

6. Tracking cartel fining in trends in Latin America is more challenging. However, referring again to the OECD Compstats internal database, total fines saw a slight uptick moving from EUR 166 million in 2015 to EUR 205 million in 2017 (Chile, Colombia, Mexico, Peru).⁶

Figure 1. Total fines imposed on cartels

Source: OECD Compstats internal database

7. Despite the increase the use and size of fines in competition enforcement, questions remain regarding the effectiveness of fines. For example, a study in 2013 noted that the mean and median overcharge rates⁷ of European cartels are 20% and 18%, with typical discovered cartels having 8.4-year lifespan (Smuda, 2012). A further assessment of the effectiveness of fines is beyond the scope of this paper; however, it is important to signal that as a competition enforcement tool, fines are not infallible. If fines are raised to a level that may be adequate for deterrence to be fully effective, many companies could face financial difficulties, which could undermine competition in the market (OECD, 2013a). Balancing deterrence with the necessity to preserve competition is discussed further on in this paper.

8. This objective of this paper is to provide an overview of different methodologies regarding corporate fines, including recent developments, used to calculate fines for infractions of competition law as well as the various elements that are taken into consideration when determining the appropriate fine level.

Box 1. Recent changes and issues regarding the fine on competition infringements in selected jurisdictions

- In Argentina, the new Competition Act No. 27,442 (the LDC) was entered into force on 24 May 2018. The LDC, among other modifications, increased the fines on infringements and introduced the country's first national leniency programme. Furthermore, a new, more independent competition authority and a new specialised court to review appeals on competition law matters were created by the LDC. According to the New Competition Law, fines for anticompetitive conducts shall be calculated using whichever results the higher of the following two alternative methods: (i) up to 30% of the turnover of the product to which the infringement relates during the last fiscal year multiplied by the number of years of infringement.

This amount cannot exceed 30% of the consolidated turnover achieved by the offender's economic group in Argentina during the last fiscal year; or (ii) twice the economic benefit deriving from the infringement. If fines cannot be established by using the methods (i) or (ii) above, then fines for each offender cannot exceed the amount of ARS 4,000 million (Argentina peso, approximately USD 167 million).⁸

- In Chile, a legal reform to the Chilean Competition Law came into force in August 2016. Anti-competitive practices may trigger fines of (i) up to double the illicit gains obtained by the offenders or (ii) up to 30% of the annual sales of the companies related to the goods or services to which the infringement relates during the period in which the infringement took place. As a default option, if neither the illicit benefit nor the sales of the companies infringing can be determined, fines could be up to USD 50 million (United States dollar) (OECD, 2017).
- In Colombia, legal entities that infringe competition regulations could be fined (i) up to 100 000 minimum legal wages (approximately USD 27 000 million) or (ii) up to 150% of the revenues derived from or associated to the antitrust conduct. Due to the difficulty in determining the amount of illegal profits, the Colombian competition authority (SIC) mostly sets its own fine by using the first method, which restricts the agency from imposing big fines. Some experts also argue the fine is not sufficient deterrent for large companies, and it should instead be calculated as a percentage of a company's assets or sales.

2. The Objectives of Fines

9. The objectives of imposing fines are usually all or a matrix of deterrence, punishment, or disgorgement:

- Deterrence eliminates the incentive to engage in illegal and anticompetitive conduct;
- Punishment is a penalty on undertakings or individual for breaching the competition law; and
- Disgorgement requires the undertakings or individual that violated the law to give up any financial benefit from its illegal activity.

10. Some jurisdictions may place more emphasis on one objective over another, or exclude one objective entirely from their objectives. For many competition authorities, the objectives of deterrence from engagement in illicit conduct by the same individuals or undertakings in the future (i.e. specific deterrence) is particularly important. These same fines are also intended to dissuade other potential infringers from forming or joining anticompetitive cartels (i.e. general deterrence).⁹

11. Other authorities focus on the punishment of corporate cartel who are participants in the infringement, or to recover any unlawful gains obtained by the cartel participants at the expense of their customers. In the United States and Canada, authorities indicated that, when determining the appropriate fines, courts must consider, inter alia, the need to provide restitution to any victims of the offence.¹⁰

12. The objectives of punishment and disgorgement are closely related to the objective of deterrence. By showing that the competition authority will punish undertaking or individuals for proven breaches of the competition law, the incentive for engaging in that conduct is deterred. By taking away any profits coming from their illegal conduct, the incentive for engaging in that conduct is also eliminated and thus the conduct is deterred (OECD, 2016a).

13. The way criteria for calculating fines may differ depends on the objective(s). For example, fines imposed by the Portuguese Competition Authority aim to punish the offenders and deter them from future violations, as well as to deter the wider community from breaching the competition rules. Once the base amount has been calculated and adjusted either up or down to take into consideration mitigating or aggravating circumstances, the proposed fine may again be adjusted. The fine 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 (OECD, 2016b).

14. In Canada, the Competition Act clearly states that the purpose of administrative monetary penalties, in cases of abuse of dominance, is to “promote practices” that are “in conformity” with the law, the Competition Act explicitly excludes punishment as a purpose of such penalties.¹¹ In contrast, Germany can impose punitive fines with added compensation for excess gains (ARC section 81(5)) because according to Section 17(4) of the Act on administrative offences, administrative fines shall exceed gains made as a result of the infringement. Therefore, the character of fining system in Germany includes both punishment and disgorgement (OECD, 2016a).

15. In Chile, the fines fulfil, in the first instance, a punitive function. Two of the factors considered in determining the amount are based on censure of the behaviour of the infringer (severity of behaviour and repeated offenses). Another factor taken into account is the economic benefit obtained by commissioning of the conduct, such that the recovery of illegally-acquired profits (disgorgement) is, to some extent, the second aim of the penalties. The potential deterrent effect is a third goal of the system (OECD, 2013b).

3. Fine Setting Methodologies

16. While there exists a few differences in each jurisdiction, most of the jurisdictions typically follow four main steps in the determination of fines: (i) calculation of base fine; (ii) adjustment of the base fine for aggravating and mitigating circumstances; (iii) additional adjustments; and (iv) consideration of the leniency and immunity programmes.¹²

3.1. Step I – Calculation of Base Fine

17. Determining the amount of fines starts with the calculation of the base fine. To calculate the of base fine, jurisdictions take two elements into consideration: an initial measure, which seeks to reflect the expected illegal gains from the infringement of competition law, and a percentage-rate applicable to the initial measure.

3.1.1. The Initial Measure

18. In most jurisdictions, the initial measure of fine will be determined by considering the scope of the relevant corporate activity and its duration.

Scope of Activity

19. To ensure that fines can achieve their deterrent effect, fines should be larger than the expected illegal gains from anticompetitive conduct or the presumed damage to consumers in the relevant market. However, it is generally difficult for competition authorities to obtain accurate data and estimate precisely the illegal gains or the damage to consumers, and thus most jurisdictions use proxies for illegal gains or consumers' damage.

Box 2. Determining illegal benefit from the infringements in Peru

Peru, instead of relying on proxies, places greater reliance on the illicit benefit than other jurisdictions that a company derives from a competition infringement. In Peru, the basic fine is equivalent to the expected illicit benefit divided by the probability of detection of the anticompetitive conduct. The illicit benefit would be determined by the Commission for the Defence of the Free Competition as the difference between the anticompetitive price and the competitive price, and will consider the duration of the infringement. The probability of detection is determined by the difficulty to detect the investigated offense. If there is a difficulty to uncover an illicit conduct, the probability will proportionally increase the applicable fines (OECD, 2016c; OECD, 2018a).

20. Many jurisdictions refer to concepts related to the corporation's turnover as proxies for determining the initial measure of fine. Familiar as it may sound, the specific definition of turnover varies amongst jurisdictions. While some jurisdictions refer to global turnover, most jurisdictions use the concept of relevant turnover or the value of affected commerce when determining the initial measure of fine.¹³

21. Relevant turnover would commonly be defined as the amount of the undertaking's sales of goods or services concerned by the infringement in the relevant geographic area.

- In the EU, the relevant turnover is 'value of sales in the relevant market', i.e. the value of the undertaking's sales of the goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the European Economic Area (EEA) during the last full business year of the undertaking's participation in the infringement.¹⁴
- In the United States, the initial measure of fine would be decided by referring to the volume of commerce attributable to an individual participant in an antitrust infringement.¹⁵
- In Argentina, Chile, Colombia, Germany, Hungary, India, Korea, Malaysia, Mexico, Singapore, Slovak Republic, South Africa, Spain and the United Kingdom, among others, a similar concept of relevant turnover, which corresponds loosely to the sales of relevant goods or services affected by the infringement, is used for setting initial measure.¹⁶

Box 3. Relevant turnover as an initial measure in Selected Latin American Countries

Several Latin American countries use the similar concept of relevant turnover when set the initial measure but differ in the specific term used (OECD, 2016a).

In Argentina and Chile the sales of the goods or services to which the infringement relates is used for the initial measure.

In Colombia, the initial measure is set as the sales value of the company in the affected market in which the infringement was executed.

In Mexico, the affected sales are the product of multiplying the market size by the violator's market share and the duration of the violation.

22. In other jurisdictions such as Brazil and Turkey, total or global turnover of the undertakings concerned is referenced to determine the initial measure of a fine. However, no complete convergence has yet to be achieved on the definition of total or global turnover.

- In Brazil, the initial measure of a fine is determined as “0.1% to 20% of the gross revenue of the company, group or conglomerate obtained in the last fiscal year prior to the initiation of administrative proceedings, in the affected business sector” (OECD, 2019: 111-112).
- In Turkey, the initial measure of a fine is calculated as a certain percentage of the annual gross revenues of the undertakings concerned, generated at the end of the fiscal year preceding the final decision.¹⁷

Box 4. Difficulties to determine the scope of activity: the case of Brazil

In Brazil, the amount of the fine is determined as 0.1% to 20% of the gross revenue of the company, group or conglomerate obtained in the last fiscal year prior to the initiation of administrative proceedings, in the affected business sector.

In order to determine “affected business sector”, the Brazilian competition authority (CADE) adopted Resolution No 3/2012, which categorizes 144 fields of activity based on industrial classification used by other government authorities and work carried out by the Department for Economic Studies.

However, the classification is so broad that it may include the total turnover of a company. Furthermore, if two or more business sectors are affected, their turnover will be added to the calculation of the base fine. CADE may resort to the total turnover, whenever information on revenue derived from the relevant “affected business sector” is unavailable. This shows that the classification system in Brazil might be difficult to apply in practice (OECD, 2019).

Duration of the infringement

23. When setting the initial measure of a fine, most jurisdictions take the duration of the infringement into account. However, differences exist among jurisdictions in the specific methodologies used to determine the duration of the infringement in order to calculate the initial measure of fine.

- In Brazil, the fine could only be imposed by reference to the last year of an infringement.¹⁸
- In Canada, Greece, Hungary, Japan, Korea, Mexico, Switzerland, Turkey and the United States, the entire duration of infringement is fully counted in determining the initial measure of fine.¹⁹
- In Argentina, Bulgaria, Italy, the Netherlands, Lithuania, Norway, Poland, Portugal, Singapore, South Africa, Sweden and the EU, the duration of the infringement is used as a multiplier. In the EU and the Netherlands, for example, the initial measure of fine is calculated by multiplying the relevant turnover of the last full business year of the undertaking's participation in the infringement by the number of years of the infringement.²⁰²¹

24. Some jurisdictions round up the duration if less than a year in order to ease the task of determining the initial and ending dates of the infringement, which can be onerous for the competition authorities and courts.

- In Argentina, the fraction greater than six months but shorter than one year of duration of the conduct shall be considered as one full year.
- In Colombia and the EU, periods of less than six months will be counted as half a year. Periods longer than six months, but shorter than one year, will be counted as a full year.
- In Germany, in cases in which the infringement lasted less than 12 months, the calculation of the initial measure of fine will be based on a period of 12 months irrespective of the actual months of the infringement.

3.1.2. Calculation of the base fine: percentage rate of the initial measure

25. Once the initial measure of fine is determined, the base fine is calculated as a certain percentage of the initial measure. Most jurisdictions decide the percentage rate applicable to the initial measure within a specific range depending on the gravity or the seriousness of the infringement.²²

Table 1. Maximum Percentage Rate Applicable to the Initial Measure in Selected Jurisdictions

Jurisdiction		Maximum percentage rate of initial measure
Latin American	Argentina	30% of the turnover of the goods or services to which the infringement relates during the last fiscal year
	Brazil	20% of the gross revenue of the company, group or conglomerate obtained in the last fiscal year prior to the initiation of administrative proceedings, in the affected business sector
	Chile	30% of the annual sales of the companies related to the goods or services to which the infringement relates during the period in which the infringement took place
	Colombia	30% of the sales value of the company in the affected market during the last financial year in which the conduct was executed
	Costa Rica	10% of corporate's gross income obtained during the previous fiscal period, or of the value of its assets or of its presumed revenue for the period (between 0.5% and 1% for serious offenses; between 1% and 10% for particularly severe offenses)
	Mexico	Up to 10% of the economic agent's annual turnover
Others	European Union	30% of value of sales in the relevant market (plus 15-25% of entry-fee for cartels)
	Germany	Start with 10% of the company's turnover achieved from the infringement during the infringement period, and then apply a multiplication factor which accounts for the size of the company
	Italy	30% of value of the sales of goods or services relating to the infringement
	Japan	10% of sales or purchases of goods or services involved in the infringement for cartels and private monopolisation (control type) 6% of sales or purchases of goods or services involved in the infringement for private monopolisation (exclusion type)
	Korea	3% of turnover from the sale of goods and services related to the transaction for abuse of dominance 10% turnover from sale of goods and services related to the transaction for cartels
	The Netherlands	10% of annual turnover, taken from the year before the year of the decision
	Portugal	30% of the value of sales of goods or services to which the infringement relates
	South Africa	30% of the affected turnover, which is the firm's turnover derived from the sales of products and/or services that can be said to have been affected by the contravention
	Switzerland	10% of the turnover achieved in the relevant markets in Switzerland during the preceding three financial years
	United Kingdom	30% of turnover in the relevant product and geographic market affected by the infringement during last year of infringement
	United States	20% of value of commerce attributable to infringing party in goods or services affected by the infringement

Sources: OECD (2016a); OECD (2013a); and contributions to the Global Forum on Competition 2016 and the OECD-IDB Latin American and Caribbean Competition Committee 2013.

26. The EU takes the gravity of an infringement into account by using a proportion of the value of sales in the relevant market during the last full business year. This proportion can be up to 30% of the value of sales depending on the gravity of the infringement. Gravity in turn is defined through an assessment of various factors, including the nature of the infringement (e.g. abuse of market dominance, price fixing, market sharing), the geographic scope of the infringement and whether or not the infringement had been implemented. In practice, this proportion varies on a case-by-case basis. In cartel cases, the base fine will be increased by a one-time amount equivalent to between 15% and 25% of the value of one year's sales, which is designed to deter undertakings from even trying a cartel (so called "entry-fee") (European Commission, 2006b).

27. In Japan, the percentage of relevant turnover depends on the type of conduct concerned as well as the operation scales and business categories of the corporations. Under the Anti-Monopoly Act (AMA), the Japanese competition authority does not have the discretion over whether to impose fine nor how much amount of fine to impose (OECD, 2016e).

Table 2. Percentage Rates in Japan

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

Source: OECD (2018b)

28. Several jurisdictions classify the percentage rates applicable to the initial measure into several categories depending on the seriousness of the infringement. In Korea, for example, the percentage rates are divided into three categories depending on the level of severity of the infringement: highly significant infringement; significant infringement; and not very significant infringement. Furthermore, different percentages are applicable under each category depending on the nature of the conduct (e.g. abuse of dominant position and cartel). The level of severity of the infringement shall be assessed based on the culpability score, which is in turn determined by several factors such as the qualitative effects of the infringement²³, the amount of illegal gains or consumers' damage, the market share of the undertakings concerned, the amount of relevant turnover and geographic scope of the infringement.

Table 3. The Percentage Rates of Selected Types of Infringements in Korea

	Abuse of dominance		Cartel	
	Culpability score	Percentage rate	Culpability score	Percentage rate
Very significant infringement	At least 2.2	At least 2.3% but not more than 3.0%	At least 2.6	At least 8.0% but not more than 10.0%
			At least 2.2 but less than 2.6	At least 7.0% but less than 8.0%
Significant infringement	At least 1.4 but less than 2.2	At least 1.5% but less than 2.3%	At least 1.8 but less than 2.2	At least 5.0% but less than 7.0%
			At least 1.4 but less than 1.8	At least 3.0% but less than 5.0%
Not very significant infringement	Less than 1.4	At least 0.3% but less than 1.5%	Less than 1.4	At least 0.5% but less than 3.0%

Source: KFTC (2017)

29. In Mexico, the base fine is determined up to 10% of the economic agent's annual turnover for committing cartels and up to 8% of the economic agent's annual turnover for committing abuse of dominant position.²⁴

30. In Spain, the Spanish competition authority (CNMC) published a set of provisional guidelines on the calculation of fines for infringements of competition law in November 2018. The newly adopted guidelines follows a two-step methodology.

- In the first step, the CNMC establishes a base amount applicable to all companies involved in the infringement. Such amount will not exceed 60% of the total amount of the fine and will be calculated on the basis of: (i) the nature of the anti-competitive conduct; (ii) the characteristics of the affected markets; (iii) the market share of the undertakings involved; (iv) the geographical scope of the infringement; (v) the effects on consumers and other market players; (vi) the amount of illegal profit gained; and (vii) the existence of compliance measures or programmes (if applicable to all companies involved).
- The remaining part of the fine is calculated individually for each of the companies involved in the infringement in view of: (i) the duration of the participation of each company in the infringement; (ii) the share of each company within the total turnover affected by the infringement (except for the abuses of dominant position); and (iii) the applicability of aggravating or mitigating circumstances. In addition, in order to ensure that the fines are proportionate, the CNMC subsequently calculates a proportionality limit over which no fine can be imposed. For such purpose, the CNMC estimates the amount of profit gained by each of the undertakings concerned during the infringement and, as a deterrent factor, multiplies such amount by a figure ranging between 1 and 4, depending on the duration of the infringement and the size of the infringing company.

31. Notably, the United States suggests the rationale for a readily determined proxy for the expected illegal gain and consumers' damage induced by the infringement. In the United States, the percentage applicable to bid rigging, price fixing or market allocation agreements is generally set at 20% of the volume of affected commerce. While the average gain from price-fixing is broadly expected to be 10% of the selling price, the consumers' damage from price-fixing exceeds the gain because, among other things, damage is inflicted upon consumers who do not buy the product at the higher prices. Because the loss from price-fixing exceeds the illicit gain, 20% of the volume of affected commerce is to be used in lieu of consumers' damage. The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss.²⁵

3.2. Step II – Adjustment of the Base Fine for Aggravating and Mitigating Circumstances

32. Once the base fine is determined, most jurisdictions then adjust the base fine with the consideration of aggravating and mitigating circumstances. Among several factors considered for the adjustment of the base fine as in Table 4, the most common and important factors are discussed below.

Table 4. Common aggravating and mitigating circumstances

Aggravating circumstances	Mitigating Circumstances
Recidivism	Compensation of injured parties
Leading role in infringement	Minor role in infringement
Coercive or retaliatory measures to ensure continuation of the infringement	Participation under duress
Obstruction of the investigation or refusal to co-operation	Co-operation with the investigation
Continuation of the infringement after start of investigation	Immediate termination of the infringements as soon as investigation starts
Intentional conduct (awareness of the illegal nature of the conduct)	Uncertainty as to unlawfulness of conduct
Institutionalised nature of the infringement	Infringement authorised/encouraged by legislation/public authorities
Significance of the industry influenced	Non-implementation of the infringement
Involvement of senior management	Slow reaction/excessive length of procedures before the competition authority
Violation of an injunction or condition of probation	Acceptance of responsibility
Size of firm	Effective compliance programme

Source: ICN (2017); OECD (2018); OECD (2016a)

3.2.1. Aggravating circumstances

Recidivism

33. The infringers with previous history of sanctions face increased fines in most jurisdictions. Increased fines for competition infringements by a company found to be a repeat offender is considered as necessary. Repeat offenders have not been deterred effectively from violating competition law by previous fines and therefore have demonstrated a higher propensity to commit infringements (Wils, 2012).

34. Certain industries are more prone to recidivism than others are. In the EU, a possible reason for the high frequency of chemical industry cartels is the determination of fines under the current fining guideline, which limits penalties to 10% of annual worldwide revenue per infringement. This fine maximum favours companies that collude in a specialised market with high sales, because cartel profits can outweigh a capped fine earlier in comparison to conglomerates active in several smaller markets, which in order to realize equally large illegal profits would have to risk facing multiple fines (Ulrich, 2018).

35. Practical methodologies to take into consideration recidivism vary amongst jurisdictions in terms of the following: the lapse of time between the prior infringement and the present one; and the amount to be increased.

- Regarding the time range, most jurisdictions set a limitation between the previous infringement and the one being fined. In France and the United Kingdom, the prior infringement must have taken place within the last 15 years. In Argentina, Japan, Mexico, Spain and the United States, recidivism covers 10 years between the infringements. In Germany and Korea, the gap between the infringements should be less than five years. However, some jurisdictions do not set any time limit between the previous infringement and the one being fined. For example, the European Commission is not subject to any limitation period in taking into account past infringements.²⁶

- In terms of the amount to aggravate, most jurisdictions adopt a percentage-increase approach. While in Argentina, Brazil, Mexico, the United Kingdom and the EU, the fine increase for repeat offenders will be of up to 100% of the base fine, the maximum increase of percentage is 80% and 50% in Korea²⁷ and Japan respectively. In the United States, recidivism increases the culpability score by up to 2 points, by which the base fine may be increased by up to 16%.²⁸

Role of the undertaking in the infringement

36. Most jurisdictions consider the role of an offender as a leader or initiator of the infringement as an aggravating element.

- In Colombia, having acted as leader, instigator or in any form promoting behaviour is one of the aggravating circumstances which should be considered in adjusting the base fine (Article 25 of Law 1340).
- In Ecuador, the role as a leader or an instigator of the infringement is one of the aggravating elements (Article 81 of Competition Law).
- In the EU, the base fine may be increased when the undertaking concerned performed a role as a leader or instigator of the infringement.
- In Japan, the base fine may be raised by 50% if a corporation played a leading role in the infringement.
- In the United Kingdom, the role of the undertaking as a leader in, or an instigator of, the infringement leads to an increase of up to 10% of the base fine.
- In the United States, the level of aggravation varies by the extensiveness of the cartel.²⁹

37. Some jurisdictions increase the base fine if there is evidence of coercion or retaliation regarding the infringement.

- In the EU, the base fine will be raised if an undertaking took steps to coerce other undertakings to participate in the infringement or the undertaking took retaliatory measures against other undertakings with a view to enforcing the practices constituting the infringement.
- In Korea, the base fine can be increased by at least 10% but less than 30% when a violating business entity retaliates against other business entities who do not respond to violation, or has other business entities to take retaliatory measures.
- In Spain, the adoption of measures to impose or guarantee the enforcement of the conduct constituting the infringement is taken into account as an aggravating circumstance.

3.2.2. Mitigating circumstances

Co-operation on the investigation

38. Co-operation with the investigation authorities is the most common mitigating factor. Co-operation, may be considered as a mitigating element in this step of fine setting procedure or it may result in reductions in fine under leniency programmes in the final step.

39. In most jurisdictions, effective co-operation is listed as a mitigating factor in a general manner, but many lack provisions on how much of a reduction of the base fine will be given to those undertakings that do co-operate:

- In EU, under its Fining Guidelines, the base fine may be reduced when the undertaking concerned has effectively co-operated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so.
- In Chile, co-operation with the competition authority before or during an investigation is the only mitigating factor specified in the Chilean Competition Law (DL 211) for adjusting the base fine.³⁰
- In Mexico, co-operation with the competition authority, over and above the violator's legal obligations, which allowed the proceeding to be concluded in a more expeditious or effective manner will be taken into account as mitigating circumstances.

40. However, some jurisdictions, on the contrary, the range of the reduction of the base fine due to co-operation is expressly stated in the guidelines.

- In the United States, the culpability score will be decreased by up to five points according to the degree of the co-operation of the offender.³¹
- In Korea, when the offender not only provocatively co-operates on investigation by acknowledging its violation consistently during the whole deliberation procedure, but also submits informative materials to prove the illegality or testifying in the context of the case, the base fine can be reduced by up to 20%.³²
- In Turkey, the base fine shall be reduced by one sixth to one fourth in case the undertakings or associations of undertakings that engaged in other violations admit their violations and make active co-operation on the investigation.³³

Effective compliance programme

41. There exists different perspectives on whether compliance programmes should be considered as a mitigating factor. Some are in favour of the reduction of the fine based on the argument that a compliance programme is critical to prevent violations from occurring, and to ensure that when violations do occur, they are quickly detected, reported and handled appropriately. However, those with opposite view argue that the mere existence of a compliance program, which failed to prevent illegal conduct, should not be considered as an attenuating circumstance, nor does it have any impact on the level of antitrust fines it imposes.

42. A few jurisdictions grant reductions of base fine when the infringer implements effective compliance programme (ICN, 2017).³⁴

- In Brazil, the Tribunal of the competition authority (CADE) may consider the compliance program as either a mitigating factor for the reduction of the base fine or criterion to be considered when calculating the pecuniary contribution to be paid by the company, in case a settlement agreement is signed.³⁵
- In Chile, the existence of a compliance programme may be considered as a mitigating factor for the adjustment of the base fine.³⁶
- In the United Kingdom, the competition authority (CMA) considers evidence of compliance activities by a company to assess whether a discount of up to 10% will be allowed or not.

43. In the United States, while the Sentencing Guidelines theoretically entitles companies to a sentence reduction if they can show that their compliance programmes are “effective”,³⁷ there have been few cases which took the compliance programme into account as a mitigating factor in practice.³⁸ The Department of Justice (DOJ) previously had taken the position that a pre-existing compliance programme was at best ineffective, or wilfully disregarded, if the company then participated in an illegal conduct.³⁹ Recently, however, the DOJ has changed its position and companies would be eligible for deferred prosecution agreements or sentencing reduction when they implement robust compliance programs, self-reporting wrongdoing, cooperate with DOJ investigators and take remedial action.⁴⁰

Minor role in the infringement

44. Limited participation or playing a minor role in the offence is one of the common mitigating factors in several jurisdictions.

- In the EU, the base fine may be reduced if the undertaking shows that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market. (European Commission, 2006b)
- In Turkey, coercion by other undertakings is listed as one of the mitigating circumstances.
- In the United States, if the offender was a minimal or a minor participant in the cartel, the culpability score will be decreased by up to 4 points.⁴¹

Termination of the infringement

45. Several jurisdictions consider immediate termination of the infringement as a mitigating circumstance.

- In the EU, if the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened, the base fine may be reduced by some degree except cartel cases.
- In Mexico, the termination of the monopolistic practice or unlawful concentration before the investigation or during the trial-like procedure may be treated as one of the mitigating factor (OECD, 2016f).⁴²

46. Furthermore, some of those jurisdictions set specific conditions for the application of it. In Japan, for instance, the base fine will be reduced by 20% if the enterprise ceases the violation (limited to when the period of implementation for the violation is less than two years) by the day at least one month prior to the starting date of the investigation.⁴³

3.3. Step III – Additional Adjustments

47. After adjusting the base fine by considering aggravating and mitigating circumstances, most jurisdictions will adjust the fine further to ensure an adequate level of deterrence. In this step, factors such as statutory limits on fines and financial capability of the offender are taken into consideration.

3.3.1. *Maximum limits*

48. Most jurisdictions set statutory limits on fines for competition law infringements, which aim to ensure the principle of proportionality and to avoid reducing competition in the market by jeopardising the viability of the company.⁴⁴

49. The maximum limits are usually defined in one or combination of the following two ways: (i) a specific monetary amount or (ii) a certain percentage of turnover or other value⁴⁵. While Canada considers only a specific monetary amount as the maximum limits, most jurisdictions refer to a certain percentage or the combination of methodologies in (i) and (ii) above.

50. Practical methodologies referring to turnover differ among jurisdictions in terms of followings: the range of turnover; the entity to which the turnover is measured; and the range of period considered.

- In terms of the range of turnover considered, most jurisdictions use the total turnover, while others use only the relevant turnover related to the infringement. For example, Chile, Colombia, Japan, Korea and the United States⁴⁶ refer to relevant turnover for deciding the upper limit of the percentage. On the other hand, for instance, Argentina, Brazil, Costa Rica, Ecuador, Germany, Italy, Mexico, the Netherlands, Portugal, Spain, Switzerland and the United Kingdom as well as the EU use total turnover for that purpose.
- Regarding the entity by reference to which the maximum limits are measured, jurisdictions vary in their positions. While the autonomy of corporate bodies and legal form are respected in some jurisdictions, the turnover of the whole economic group to which the offender belong may be considered in the others.⁴⁷
- In terms of the period considered, jurisdictions have different positions according to the concept of turnover to which referred for determining the fine. While the whole period of the infringement may be considered in the jurisdictions referring to the relevant turnover, most jurisdictions referring to the total turnover use the business/fiscal year preceding the decision to fine.

51. Below are the listed the maximum limits of fines in selected jurisdictions.

Table 5. Maximum fines in selected jurisdictions

Jurisdiction		Maximum limit of fine for corporations	
Latin American Countries	Argentina	(i) 30% of the consolidated turnover achieved by the offender's economic group in Argentina during the last fiscal year, or (ii) twice the economic benefit deriving from the infringement. If the fine cannot be calculated by using the methods (i) nor (ii) above, the fine for each offender cannot exceed the amount of ARSK 4,000 million.	
	Brazil	20% of the gross revenue of the company, group or conglomerate obtained in the last fiscal year prior to the initiation of administrative proceedings, in the affected business sector. If it is not possible to use the turnover to estimate the amount to be payed, the competition authority may apply fines up to BRL 2 billion.	
	Chile	(i) double the illegal gains obtained , or (ii) up to 30% of the offender's sales during the corresponding period in which the infringement was executed. If neither the sales nor the profits can be determined, the maximum fine is 60,000 tax unit.	
	Colombia	the greater of (i) 100,000 current legal minimum monthly wages or (ii) 150% of the profits derived from the anti-competitive conduct	
	Costa Rica	10% of corporate's gross income obtained during the previous fiscal period, or of the value of its assets or of its presumed revenue for the period	
	Ecuador	12% of the infringer's total turnover in the last business year	
	Mexico	10% of the economic agent's annual turnover	
	Other countries	Canada	CAD 25 million
		European Union	10% of total world-wide turnover of the undertaking in the preceding business year
Germany		EUR 1 million or 10% of total world-wide turnover in the preceding business year	
Italy		10% of the undertaking's world-wide turnover in the preceding business year	
Japan		10% of the sales amount of the relevant goods or services	
Korea		10% of the undertaking's relevant turnover, or KRW 2000 million if it is not possible to calculate the relevant turnover	
The Netherlands		EUR 900,000 or, if that is a higher amount, 10% of annual turnover, taken from the year before the year of the decision	
Portugal		10% of the company's total turnover in the business year preceding the decision	
Spain		10% of the total turnover of the infringing undertaking in the business year preceding the imposition of the fine.	
Switzerland		10% of the turnover achieved by the undertaking in Switzerland during the preceding three financial years	
United Kingdom	10% of total world-wide turnover during the last business year		
United States	The greatest of USD 100 million, twice the pecuniary gains derived from the criminal conduct, or twice the pecuniary loss caused to the victims of the crime		

Source: OECD (2018b); OECD (2016a); and contributions to the Global Forum on Competition 2016 and the OECD-IDB Latin American and Caribbean Competition Committee 2013

Box 5. Maximum fine in Spain

Since the entry into force of the Spanish Competition Act 15/2007 (SCA), the Spanish competition authority (CNMC) followed the same fining scheme as the EC and other European countries. Under the fining guidelines published in 2009, a basic amount of the fine was calculated as a proportion of the affected market turnover (AMT) with the limits established on article 63 of SCA. As a practical consequence, this method established high fines for serious infringements reaching in many cases the upper limit of 10% of total sales of the preceding year.

In 2013, the National Court of Spain changed the previous interpretation of article 63 of SCA in two ways: (i) the legal maximum of 10% in article 63.1⁴⁸ should be interpreted as an upper limit of fines, and (ii) “total turnover” in article 63.1 should be interpreted as “total AMT”. After this judgement, there was a significant reduction of fines (between 45% and 95% of the original fines imposed by the CNMC), and the judgement created a situation full of uncertainty as the CNMC kept on using the fining guidelines until January 2015.

In January 2015, the Supreme Court of Spain made a judgement which offered the definitive guiding principles: upheld that the upper limit of 10% should be reserved for the worst possible infringements, but this rates should be applied to total sales of the infringing company (and not only in the affected market) in the previous year. This judgement ended a long period of disagreement between the CNMC and the National Court, which, in result, reduced a significant uncertainty in the interpretation of article 63 of SCA (OECD, 2016g).

3.3.2. *Ability to pay*

52. Most jurisdictions take the ability to pay of the offender into account based on the legal principle of proportionality or the economic view that excessive fine driving the company out of the market will reduce the number of competitors and thus cause harm to competition in the market.

53. The criteria for whether, and under what conditions, the inability-to-pay claims are accepted vary among jurisdictions. Notably, Korea, among those jurisdictions who consider the ability to pay of the infringers, stipulates detailed criteria and the upper limits of reductions in the fining guidelines, which gives limited discretion to its competition authority.

- In Chile, ability to pay has been explicitly considered in some cartel cases without legal provisions. Legal provisions were introduced into the competition law (DL 211) in 2016.
- In Costa Rica, the inability to pay is a criterion for imposing a fine as establish in Article 70 of Law 8642. This criterion has been taken into consideration to determine the fine in order not to impose a fine that might lead the company into bankruptcy, or eliminate or weaken competition in the markets.
- In the EU, the European Commission may, in exceptional cases, take account of the undertaking's inability to pay in a specific social and economic context upon request of the undertaking. Reduction granted for this reason will not be based on the mere finding of an adverse or loss-making financial situation. However, a reduction may be granted solely based on objective evidence that imposition of full fine would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value. Since 2010, the European Commission has accepted several claims of inability to pay considering general economic condition got worse after the 2008 financial crisis.
- In Mexico, under Article 130 of Federal Economic Competition Law, “economic capacity” of the corporation is one of the elements that must be considered to determine the severity of the infraction.

- In Korea, the competition authority shall reduce the fine taking into account the corporation's financial condition. In case of a corporation (i) with impaired capital in the preceding business year, the fine may be reduced by up to 50%; (ii) with more than three times of debt ratio and net income deficit, up to 30%; (iii) with impaired capital exceeds 50% of the total assets, up to more than 50%. Furthermore, if a corporation is under the rehabilitation proceedings and deemed unable to pay, the fine may be exempted.
- In Portugal, the competition authority may consider the company's inability to pay the fine in exceptional circumstances. In this case, a reduction may be granted solely based on evidence that the imposition of a fine, which was determined according to the Guidelines, would irreversibly jeopardise the economic viability of the company and cause its assets to lose their value (OECD, 2016b).
- In the United States, the Sentencing Guideline allows the reduction of fines on the basis of inability to pay but "not more than necessary to avoid substantially jeopardizing the continued viability" of the company.⁴⁹ When a company claims limited ability to pay in plea discussions, it must open its financial books to the Department of Justice (DOJ). The DOJ does not seek a fine that a company cannot pay, although sometimes the fine recommended cannot be paid immediately, and is instead paid in instalments over a period of up to five years (OECD, 2016h).

54. However, accepting the inability-to-pay claims may undermine deterrence effect of the fine. For this reason, competition authorities may consider alternatives to maintain deterrence without jeopardising the economic viability of the offending corporation. Some jurisdictions, for instance, approve extended payment periods or deferred payment plan, or payment in instalments.

Box 6. Acceptance of inability-to-pay claims in the EU

Between 2010 and 2012, the European Commission accepted claims of inability to pay (ITP) in 6 cases and granted fine reductions to 12 undertakings. However, after 2012, with improving economic situations, the Commission accepted fewer ITP applications: between 2014 and 2015, the Commission accepted ITP claims in 2 cases and granted fine reductions to 4 undertakings.

- In 2010, the Commission granted fine reductions to five undertakings out of ten applied for ITP in the *Bathroom fittings & fixtures* cartel case (June 2010, COMP/39092), to three undertakings out of thirteen in the *Prestressing steel* case (June 2010, COMP/38344) and one undertaking out of two in the *Animal Feed Phosphates* case (July 2010, COMP/38866).
- In 2011, the Commission reduced fine for one undertaking who applied for ITP in the *Refrigeration compressors* cartel case (December 2011, COMP/39600).
- In 2012, the Commission accepted the ITP claims of one undertaking in the *Mountings for windows and window-doors* cartel case (March 2012, COMP/39452), one undertaking in the *TV and computer monitor tubes* case (December 2012, COMP/39437)

- In 2014, two applications for ITP were accepted in the *Envelopes* case (December 2014, COMP/AT.39780). However, the Commission dismissed ITP applications in the *Steel abrasives* case (April 2014, COMP/AT.39792).
- In 2015, two out of three applications for ITP were accepted in the *Retail food packaging* case (June 2015, COMP/AT.39563).

Source: Billard and Fabre (2018)

3.3.3. Leniency

55. After the fine is calculated through the above procedure, fine reduction or immunity may be considered in cartel cases, if applicable. Detecting the existence of a cartel is very difficult for competition agencies when relying on traditional investigative methods, such as market research or complaints from outside the cartel, such as consumers and competitors. By contrast, leniency programmes target information sources within the cartel itself, capitalising on the inherent instability of an illegal conspiracy (OECD, 2015). Leniency programmes continue to be a major investigative tool for some jurisdictions in Latin America, and are gaining increasing importance in others.

- In Argentina, the New Competition Law (Law No. 27,442), which was enacted from 23 May 2018, created the first ever leniency programme in the country. The first applicant shall obtain civil and criminal immunity, and second-in applicants may obtain reductions, based on the chronological order of the applications, ranging between 50% and 20% of the fines, if other conditions are satisfied.
- In Brazil, a leniency programme was introduced in the competition law in 2000, and the first leniency agreement was signed in 2003. Between 2003 and February 2019, the competition authority (CADE) executed 87 leniency agreements, which contributed to the opening of 63 administrative proceedings. In addition, throughout this period, CADE reached cease-and-desist agreements⁵⁰ that resulted in voluntary monetary contributions of approximately BRL 1.95 billion (Brazil reais) (approximately USD 600 million).⁵¹
- In Colombia, a leniency programme was established as part of Colombia's competition law regime in 2009 and the first leniency applications were received in 2013. Between 2013 and May 2018, (i) 31 leniency applications were filed; (ii) 15 leniency agreements signed; (iii) five investigations with statement of objections were issued; and (iv) four cases (*Baby Diapers* cartel, *Soft Papers* cartel and *Scholar Notebooks* cartel in 2016, *Private Security Services* cartel in 2017) were closed with sanctions and/or recognition of benefits (OECD, 2018c).
- In Mexico, a leniency program was introduced in 2006. Since the first applicant in 2007 to 2017, there have been 130 applications (OECD, 2018d). In June 2015, the Mexican competition authority (COFECE) issued Leniency Guidelines to provide certainty and clarity to the general public and potential applicants to the leniency programme.
- In Peru, a leniency programme has been included the law since 1996, but it was only in 2012 that the first application was submitted. In 2017, the first leniency agreement has resulted in a penalty in the *Toilet Paper* cartel case. In this case, Kimberly-Clark came forward first and received immunity, while Protisa's fine was

reduced by 50%, meaning that the company will pay a penalty of PEN 52 million (Peruvian sol) (EUR 15 million). In August 2017, the competition authority published its Leniency Program Guidelines to improve the transparency and predictability of the program.⁵²

4. Practical Issues

4.1. Addressees of Fines

56. Fines are imposed on the undertakings engaged in infringements of competition law.⁵³ However, the definition or the scope of an undertaking, as the addressee of fines, vary among jurisdictions.

4.1.1. Parental Liability

57. There are two different views on whether the parent companies are held liable for the infringements committed by their subsidiaries.

58. In some jurisdictions, the autonomy of corporate bodies and legal formalities are to be respected, and the liability of the infringement limited to the individual corporation itself. According to this view, the majority ownership (even 100% ownership) of the share of a subsidiary will not sufficiently attribute liability to the parent company for an infringement of the subsidiary; nor will it create a presumption that the parent company exercises decisive influence over the conduct of its subsidiary (OECD, 2016a), (OECD, 2018b).

59. In the other jurisdictions, an undertaking on which the fine is imposed may consist of one or several legal entities. The liability of the infringement will not be limited to the offending corporation itself; it may be expanded to its parent company or the other corporations belong to the same corporate group in case a certain conditions are met.⁵⁴

60. One of the main justifications for parental liability is to ensure a stronger deterrence effect. First, parental liability may allow higher fines for a certain infringement. Second, the parent company is could be more willing to supervise their subsidiaries more closely in order to prevent the unlawful conducts. Because of parent liability, parent companies cannot escape responsibility through strategic corporate restructuring for the infringements in which their subsidiaries participated. Corporate restructuring could limit the power of competition authorities to impose fines, thus potentially undermining the deterrent effect of fines.⁵⁵

Box 7. Parental liability in selected jurisdictions

- In Brazil, the fines range between 0.1% and 20% of the gross revenue of the company, group or conglomerate obtained in the last fiscal year prior to the initiation of administrative proceedings, in the affected business sector.
- In Costa Rica, a parent company can be held jointly liable for antitrust violations committed by its subsidiary. Under Article 68 of the Law 8642, for purposes of imposing a penalty, the competition authority of Costa Rica (SUTEL) must assess whether the offender is part of an economic group. If it is, the fine will be imposed considering the income or sales of all the companies that are part of the economic group as defined in Article 6 of the Law 8642. The Article 6 of the Law 8642 defines an economic group as a group of companies that have unity of direction or economic dependence, regardless of the legal status of the companies involved (OECD, 2016k).
- In the EU, the EU Courts define an “undertaking”, which is the addressee of fines in the EU competition law, as an “economic unit”, and accordingly an undertaking may consist of one or several legal persons. In the *Akzo Nobel* case⁵⁶, the EU Courts decided that the parent company is responsible together with its subsidiaries for the participation of the subsidiaries in the competition law infringement “if the companies concerned do not determine independently their own conduct on the market, but carries out, in all material, the instructions given to it by the parent company”. A subsidiary’s lack of independence may be determined by parent company’s capability of exercising decisive influence over subsidiary’s conduct and actual exercise of such influence. Furthermore, in the *Akzo Nobel* case, a parent company was presumed, albeit rebuttable, to exercise decisive influence and held liability if it held 100% of the capital of a subsidiary who committed an infringement.⁵⁷

61. From a practical perspective, parental liability can affect the amount of fines calculated in two ways. First, the maximum limit of fines will apply and be calculated based on the corporate group overall instead of individual companies, and thus offending subsidiaries may be subject to higher fines. Competition authorities can thus prevent strategic behaviour by a parent company to violate intentionally competition law via one of their subsidiaries and to benefit from the lower maximum limit of fine. Second, parent liability may increase the possibility of recidivism. In other words, an offending subsidiary company can be considered a repeat offender if there exists previous infringements by the parent company or other subsidiaries in the same corporate group, and the amount of fine can thus be adjusted accordingly.

4.1.2. Trade Associations

62. Some jurisdictions impose fines on trade associations of undertakings that infringe competition law.⁵⁸ The methodologies to determine the initial measure of the base fine vary amongst these jurisdictions.

- Some jurisdictions use the turnover of the members of the association as the basis of calculation of fines.⁵⁹ In the EU, for instance, when determining the initial measure of the base fine, if the infringement by an association of undertakings relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members (European Commission, 2006b).
- Other jurisdictions rely on the turnover of the association itself for the calculation of the base fine.⁶⁰ In this category, the actual basis used as the turnover of the

association varies among jurisdictions: for example, the total amount of fees collected to the associate from the members in Italy; and the association's annual budget in the last fiscal year of the infringement in Korea.

- Other jurisdictions have the discretion to choose between turnover of the association itself and turnover of the members.⁶¹ In the Netherlands, for example, it depends on the degree to which the members were involved in the infringement and on the degree to which their turnover is affected by the infringement of the association (ICN, 2017).

63. Collecting fines from trade associations is also challenging since the associations may easily dissolve itself and reform as a different legal entity. Some jurisdictions have introduced a provision where if the fined association is insolvent, the association must call for contributions from its members to cover the fine.⁶²

4.2. Judicial Review

64. During the judicial review procedure, the decision of the competition authority may be annulled partially or completely, and the amount of the fine can be adjusted. In the EU, for example, the amount of the fine on the cartel violators was reduced by 8.3% during the appellate procedure between 1990 and March 2019.⁶³

65. In some jurisdictions, appeals to the judiciary have suspensory effects, and the obligation to pay the fine may be suspended until the completion of the judicial review process. In this case, the deterrent effect of fines could be weakened, and thus a few measures to maintain deterrence have been adopted by some jurisdictions (OECD, 2016a).

- In Brazil, judicial scrutiny suspends the payment of the fine under the condition that the fined company blocks the entire amount of the fine in a specific bank account (OECD, 2016a).
- In Colombia, a fined company may post a bond before the courts to guarantee the payment of the fine, and, if the bond is accepted, the fine will be suspended until the courts' final decision (OECD, 2016a).
- In Ecuador, Article 67 of the Competition Law provides that the requirement to pay the fine is not suspended during administrative review by the competition authority (Superintendence).⁶⁴ However, Article 69 allows suspension of the payment during judicial review by the Administrative Courts provided that the fined company renders 50% of the amount of the fine through an insurance policy or bank guarantee.

4.3. Collection of Fines

66. The deterrent effect of fines can be undermined if other prospective violators perceive that such fines are not actually paid and collected. However, some jurisdictions have difficulties in collecting antitrust fines due to the following reasons: (i) the fined companies appeal to the courts against the decisions of competition authorities and easily delay the payment of the fines; (ii) companies may avoid payment of fines by liquidating themselves; and (iii) antitrust fines are not collected by competition authorities themselves but by other administrative agencies (OECD, 2016i) or via judicial procedure (OECD, 2016a).

67. Some competition authorities have made efforts for the effective fine collecting. In Colombia, for example, the competition authority (SIC) has a special division, the *Coercive Collection Working Group*, which is in charge of collecting fines. If a fine remains unpaid

after its due date, the SIC can then proceed to seize financial assets in bank or brokerage accounts, as well as to auction the debtor's tangible assets.⁶⁵ In Peru, Article 43 of the Competition Law provides that the applicable fine can be reduced by 25% in cases that the violator pays the amount before the deadline to contest the decision of the competition authority (INDECOPI).

4.4. Settlements

68. Settlements or plea agreements are means by which competition authorities and settling parties can enhance procedural efficiencies.⁶⁶ For the competition authorities, settlements may save time and resources that would otherwise be required in a more comprehensive procedure. In addition, a competition authority may use the economised resources to detect and prosecute other companies' infringements, which leads to greater overall deterrence.⁶⁷ Settlements provide significant benefit to defendants as well: settling defendants may not only receive a fine reduction,⁶⁸ but also avoid an ordinary investigation and litigation procedure that is often lengthy and costly.

69. It is worth noting that only a well-designed settlement system will provide the expected efficiency benefits and assuage concerns of possible weakened deterrence (OECD, 2008).

- First, the rules on the settlement procedure and reward must be transparent, predictable and consistent in order to increase the defendants' willingness to settle. To enhance transparency, competition authorities or courts should provide explicit rules and clear explanations of enforcement discretion in applying those rules. Moreover, the defendants must be able not only to predict how they will be treated if they apply for a settlement agreement and co-operate; but also, to assess the expected gains from the settlement.
- Second, to maintain the deterrent effect of competition law enforcement, competition authorities should retain sufficient discretion to enter into or discontinue settlement procedures. Furthermore, competition authorities must be able to make a credible threat that substantial sanctions could be imposed should the settlement procedure be terminated and the case turned into an ordinary procedure.
- Third, especially in cartel cases, the settlement policy should not conflict with the leniency programme.⁶⁹ Possible reductions on potential fines provided by the settlement procedure must be carefully balanced with the discounts offered by leniency. If discounts in settlements are too generous and high, compared with the reduction through leniency, there will be less incentive for cartel participants to apply for leniency and co-operate in the investigation.

Box 8. Settlements in selected jurisdictions

- In Brazil, settlements, referred to as cease-and-desist agreements, are used extensively to resolve both cartel and conduct cases.⁷⁰ In cartel cases, settling

parties must: (i) acknowledge their involvement in the cartel; (ii) cease their participation in the conduct; (iii) pay a pecuniary contribution; (iv) provide meaningful collaboration to the competition authority. Discounts of up to 50% will be provided for settling parties in cartel cases, depending when settlement is proposed and their place in queue.⁷¹

- In Colombia, an investigation may be closed when the alleged offender provides reasonable guarantees that it will suspend or modify the conduct under competition authority's investigation.⁷² Once consensus is reached, the competition authority (SIC) issues an order accepting the commitments and closing the case. Through the settlement procedure, the suspected anticompetitive conduct can be terminated in a quick and low cost way. However, the settlement entails no fines and thus the deterrent effect might be limited. After having received considerable criticism in the past for resolving serious cartel cases by settlement, the SIC has rejected settlement offers in hard-core cartel cases in for deterrence (OECD, 2016j).
- In the EU, the settlement procedure is used by the Commission to speed up the procedure for the adoption of a cartel decision when the parties admit to the Commission's objections, and in return, the parties receive a 10% reduction in the fine. The key element in the EU's settlement procedure, in comparison to standard antitrust procedure, is that settling companies choose to acknowledge their involvement in the cartel and their liability for it. In return for settling, the companies receive a 10% reduction in cartel fines. This benefit in fine reduction adds to the fine reduction of leniency, if applicable.⁷³
- In Peru, Article 26-A of the Peruvian Competition Act allows investigated companies who recognise the investigated infringement to get a reduction of up to 15% of the fine to be imposed. The main features of a settlement are: (a) recognition of the infringement; (b) an early conclusion of the proceeding; and (c) a reduction in the imposed fine (OECD, 2018a).
- In the United States, negotiated plea agreements are used to obtain co-operation in exchange for reduced sanctions. Defendants who do not qualify for full immunity, which is granted only to the first defendant to apply and be accepted to the leniency programme, but offer timely and enough co-operation, can still be eligible for significant reduction of fines under the plea agreements regime.⁷⁴

Box 9. Appeals of settlement decisions in the EU

While settling parties are required to admit their liability in the infringement during the settlement procedure, they are still entitled to appeal settlement decisions in the EU.⁷⁵ So far, three settling parties have introduced appeals before the EU General Court.

- In 2014, *Société Générale*, a settling party the Euro Interest Rate Derivatives (EIRD) case, appealed against the Commission's settlement decision to the General Court. It was argued that the European Commission had made an error of calculation of the amount of fine, and infringed its duty to state reasons and violated the principle of equal treatments.⁷⁶ On 6 April 2016, the Commission amended its decision based on corrected financial figures supplied⁷⁷, and *Société Générale* withdrew its appeal in February 2016.
- In 2015, *Printeos* appealed against the settlement decision in the Paper Envelopes case. Similarly, to *Société Générale*, *Printeos* also claimed that the Commission had allegedly violated the principles of proportionality and equal treatment, and failed in its duty to state sufficient reasons in calculating the fine.⁷⁸ On 13 December 2016, the General Court annulled the fine imposed on *Printeos*. This was the first time a settling party successfully challenged a settlement decision.⁷⁹
- On 15 December 2016, the EU General Court upheld the decisions of the European Commission in the *Smart Cards Chips* case, in which the Commission had terminated the settlement discussions for lack of progress and had reverted to the ordinary infringement procedure.⁸⁰

5. Conclusions

70. In Latin America, fines are increasingly applied for serious violations of the national competition laws. Imposing dissuasive fines that are proportionate to the competition law offence is one of the main objectives of fining regimes for competition law violations. To deter successfully illegal activities, the level of fines is determined by considering both expected gains from the illegal activity and probability of detection. However, it is difficult to analyse exactly the average cartel overcharges and probability of detection in each case. Some research asserts that fining offenders based on 10% of revenue in the affected products and a limited duration may be inadequate to deter cartel conduct. Other research suggests that fines in the range of 10% of revenue are adequately dissuasive (OECD, 2013a).

71. While fines can be an effective deterrent mechanism, excessive fines may undermine competition in the market. They may affect shareholders, bondholders and other creditors of the infringing undertaking, or employees, in case the payment of the financial penalty leads to a job cutting exercise in order to limit costs, even if none of the above may have been aware of the illegal activity or contributed to it. Furthermore, consumers may be harmed if the amount of the fine is passed on to them in the form of higher prices (Ioannis, L., et al., 2014).

72. This paper identified the growing importance of fines in competition enforcement and that fining regimes around the world share many common features. Fines are usually set based on a four step process. (i) calculation of base fine; (ii) adjustment of the base fine for aggravating and mitigating circumstances; (iii) additional adjustments; and (iv) consideration of the leniency and immunity programmes.

- Many jurisdictions use concepts related to the corporation's turnover as proxies to determine the base fine. Some jurisdictions refer to global turnover, while others use the concept of relevant turnover or the value of affected commerce affected by the infringement during the period of violation.
- Most jurisdictions will take the duration of the infringement into account, however they may determine and define "duration".
- Jurisdictions consider the gravity of the offense, adding a percentage to the fine based on a proportion of relevant turnover.
- The base fine may be increased or decreased in light of mitigating or aggravating circumstances. Mitigating circumstances include the degree of participation in the offense; co-operation with investigating authorities; participation under duress; acceptance of responsibility and so forth. Aggravating circumstances include recidivism; role as leader, coercer or instigator; obstruction of the investigation; knowingly and willingly engaged in the infringement and so forth.
- Most jurisdictions have set statutory limits on fines for competition law infringements, which aim to ensure the principle of proportionality and to avoid reducing competition. Ability to pay is also factored into determine the amount of the fine.
- Most jurisdictions set statutory limits on fines for competition law infringements, which is applied when the final amount of the calculated fine the designated cap.

73. Despite the divergences, it is widely accepted that adoption and publication of guidelines that detail the fining methodology of a jurisdiction brings positive effects in several ways. Guidelines deter undertakings from anticompetitive conduct if they realise that the expected costs of engaging in the conduct would exceed the potential gains. In addition, guidelines on fines can help create transparency and consistency enabling competition authorities to implement a fining policy that can withstand pressure for unfair special treatment in certain individual cases. Further, they make it easier for the addressees of fines to understand why the fine are set at specific levels thus possibly reducing the number of appeals and promoting compliance with competition law. Finally, the principle of "nullum crimen et nulla poena sine lege" tells us there must be a legal provision establishing and imposing a specific punishment on the offenders of such conduct if the conduct is decided as a crime or offence (OECD, 2016a).

Endnotes

- ¹ Fines refer to as sanctions on the merits of the case, not for procedural breaches.
- ² The authors could not find evidence of a similar database for abuse of dominance fines although record fines have been imposed, by for example, the EU in recent times.
- ³ OECD Compstats internal database monitors cartel fines on a voluntary basis. Between 2015 – 2017 the sample size consisted of 43 countries: Australia, Austria, Belgium, Bulgaria, Canada, Chile, Colombia, Czech Republic, Croatia, Denmark, Estonia, France, Germany, Hungary, Iceland, India Indonesia, Israel Italy Japan Korea, Latvia, Lithuania, Netherlands, Norway, New Zealand, Peru, Poland, Romania, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States and the EU. The database is currently not available for public use.
- ⁴ EU Cartel Statistics available at: <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> . Figures up to 16 May 2019.
- ⁵ EU Cartel Statistics available at: <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> 4 July 2019.
- ⁶ OECD Compstats internal database.
- ⁷ The cartel overcharge is the difference between the cartel price and the so called “but-for” price that would prevail in the absence of a cartel.
- ⁸ The fining methodologies are in Article 55 b). The Spanish text of the New Competition Law is available at: <https://www.boletinoficial.gob.ar/#!DetalleNorma/183602>.
- ⁹ See ICN (2017)
- ¹⁰ Id.
- ¹¹ See <https://www.competitionpolicyinternational.com/abuse-of-dominance-why-fine/> for a discussion on fines for abuse of dominance in Canada: “Pursuing a deterrent purpose only was made necessary by Canadian constitutional considerations; were the administrative monetary to operate as a sanction, it would require that criminal due process rights be afforded to a respondent (including the obligation to prove abuse of dominance beyond a reasonable doubt). See, *R v Wigglesworth*, [1987] 2 S.C.R. 541.
- ¹² Several jurisdictions including some Latin American countries such as Brazil, Chile, Colombia, Mexico and Peru may impose fines on individuals involved in competition law infringements. According to an ICN survey, 23 of 33 jurisdictions responded that individuals found liable for competition law violation may be imposed either administrative or criminal pecuniary sanctions. Fining of the individuals may enhance the overall deterrence effect of fines. However, it is difficult to identify possible common trends in the criteria determining the amount of the fines on individuals among jurisdictions. Thus, in this background note, only the fining methodologies for corporates are covered, and those for individuals are excluded.
- ¹³ According to an ICN survey, 26 of 33 jurisdictions responded they refer to relevant turnover or value of affected commerce for determining the initial measure of fine: Australia, Austria, Brazil, Bulgaria, Canada, the EU, Finland, Germany (as regards the concepts used by the Bundeskartellamt based on its fining guidelines), Greece, Hungary, Ireland, Italy, Japan, Korea, Lithuania, Malaysia, the Netherlands, Norway, Poland, Russia, Singapore, Spain, Sweden, Switzerland, Turkey, and the US. See ICN (2017), p.20.
- ¹⁴ European Commission (2006), para. 13.

¹⁵ Federal Sentencing Guidelines Manual §2R1.1.(b)(2). When multiple counts of infringements are involved, the volume of commerce should be treated cumulatively to determine a single, combined offence level.

¹⁶ For the details, see OECD (2016a), p.11.

¹⁷ The percentage rate is between 2% and 4% for cartels and between 0.5% and 3% for other violations. See OECD (2016a), p.12.

¹⁸ This could often leads to a failure to account for the illegal gains and consumer damage of the infringements, and results in smaller fines for companies that engaged in anticompetitive conduct for years, compared to companies whose anticompetitive conduct lasted for only months. See OECD (2019), p. 112.

¹⁹ However, there exists a limitation on the length of period considered in some jurisdictions: Japan only considers maximum of three years when taking into account of the duration of the infringement; in the Netherlands the maximum number of years to be considered is four years; and Switzerland considers the preceding three financial years to determine the base fine. In Switzerland, notably, the duration of the infringement will be considered again as an additional aggravating factor after the determination of the base fine: if the infringement of competition has lasted for one to five years, the basic amount shall be increased by up to 50%; if the infringement has lasted for longer than five years, the basic amount shall be increased by an additional sanction of up to 10% for each additional year (Ordinance on Sanctions imposed for Unlawful Restraints of Competition, Article 4) <https://www.admin.ch/opc/en/classified-compilation/20040326/index.html>.

²⁰ However, some jurisdictions in this category set the maximum limit to consider. In the Netherlands, for instance, the maximum is four years. ICN (2017), p.26; OECD (2016d); OECD (2016), “Annual Report on Competition Policy Developments in the Netherlands – 2015 –”, p. 5.

²¹ In order to distinguish this category from the above one, consider an example of a three-year infringement in which the first year sales revenue of the infringement was USD 50 million, the second year sales revenue was USD 60 million and the last year (the previous of the decision) was USD 40 million. In this category, the initial measure is USD 120 million (USD 40 × 3 years), which is different from the initial measure in the above category (USD 50 + 60 + 40 million = USD 150 million). The jurisdictions in this category may bear less burden to prove the exact initial date and the ending date of the infringement than the jurisdiction in the above category.

²² However, some jurisdictions do not consider the gravity of the offence when determining base fine. For example, in Japan, the base fine depends on the type of conduct and business pursued by the offending corporation and the size of the corporation.

²³ For example, increase of the market price, decrease of the market supply and anti-competitive effect.

²⁴ The Federal Economic Competition Law (FECL), Article 127.

²⁵ See United States Sentencing Commission Guidelines Manual 2018, available at <https://www.usss.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf>

²⁶ While there is no pre-determined time limitation in the 2006 Fining Guidelines, the EU Courts consider the principle of proportionality and require the passage of time between the infringement being fined and any prior infringement should be taken into account in assessing the propensity of an undertaking to infringe the EU competition rules. See *Lafarge* (Case C-413/08 P *Lafarge SA v European Commission* [2010] ECR I-5361) and *Groupe Danone* (Case T-38/02 *Groupe Danone v European Commission* [2005] ECR II-4407, on appeal: Case C-3/06 P [2007] ECR I-1331).

²⁷ In 2017, Korean competition authority (KFTC) revised the Guidelines for Imposing Administrative Monetary Penalties to intensify the fine for the repeat offenders. The KFTC prolonged the time limitation between the infringements from 3 years to 5 years, and also increased the maximum percentage level from 50% to 80%. If a firm committed one previous infringement within the last 5 years, the base fine will be increased at least 10 % but less than 20%; if it committed two previous infringements during that years, the base fine may be raised at least 20% but less than 40%; for three

previous infringements, the base fine will be increased at least 40% but less than 60%; and for four previous infringements, the base fine will be increased at least 60% but less than 80%.

²⁸ The culpability score by up to one point if the previous infringement was committed more than five but less than ten years before, and two points if the previous infringement occurred less than five years ago. See United States Sentencing Commission Guidelines Manual 2018 §8C2.5.

²⁹ The culpability score by up to one point if the previous infringement was committed more than five but less than ten years before, and two points if the previous infringement occurred less than five years ago. See United States Sentencing Commission Guidelines Manual 2018 §8C2.5.

³⁰ See Article 26 c) of the Chilean Competition Law (DL 211).

³¹ The Federal Sentencing Guidelines decreases the culpability score by five points if the organisation reported the offense to the appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its conduct. If the organisation did not self-report, but fully cooperated in the investigation and clearly demonstrated recognition and affirmatively accepted responsibility for its conduct, the culpability score is subtracted by two points. Finally, if organisation did not self-report or cooperate, but clearly demonstrated recognition and affirmative acceptance of responsibility for its conduct, the culpability score is subtracted by one point. See United States Sentencing Commission Guidelines Manual 2018 §8C2.5.

³² However, if the offender had been granted full immunity or fine reduction in the context of the leniency programme, this reduction of the fine based on the co-operation will not be provided. See The Guidelines for Imposing Administrative Monetary Penalties §IV.3.C.(3).

³³ Article 7 of Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position, available at <https://www.rekabet.gov.tr/Dosya/regulations/2-pdf>.

³⁴ According to the ICN survey, 9 of 33 responding jurisdictions take a company's compliance program into consideration as a mitigating factor.

³⁵ See Guidelines on Competition Compliance Programs §3.3.4., available at <http://en.cade.gov.br/topics/publications/guidelines/compliance-guidelines-final-version.pdf>.

³⁶ In 2012, the Chilean competition authority (FNE) published the Guidelines for Competition Law Compliance Programmes. The Guidelines set four essential requirements that are well-known features in the field: (i) a real commitment to comply with competition regulations; (ii) the identification of current and potential risks faced by the firm; (iii) internal mechanisms and procedures that accord with the commitment to comply; and (iv) the participation of Managers and/or Directors in the Compliance Programme.

³⁷ See United States Sentencing Commission Guidelines Manual 2018 §8B2.1.

³⁸ In 2015, for instance, the DOJ granted fine reductions to two cases (*Barclays PLC* in the foreign currency exchange case and *Kayaba* in the auto parts investigation) considering defendants' compliance efforts.

³⁹ The Guidelines has a presumption, albeit rebuttable, that a corporation did not have an effective compliance program if an individual with substantial authority involved in the violation [See §8C2.5(f)(3)(b)]. In most antitrust cases, such individuals actively participated in the illegal activity.

⁴⁰ See the remarks of Assistant Attorney General Makan Delrahim delivered at the New York University School of Law Program on Corporate Compliance and Enforcement on 11 July 2019, available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-1-0>. The DOJ also released Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations on the same day, available at <https://www.justice.gov/atr/page/file/1181891/download>.

⁴¹ If the defendant was a minimal participant in any criminal activity, the culpability score will be decreased by 4 points. If the defendant was a minor participant in any criminal activity, decrease by 2 points. In cases falling between above two, decrease by 3 points (United States Sentencing Commission Guidelines Manual 2018 §3B1.2.). In 2018, the Primer on Aggravating and Mitigating Role Adjustments, which is available at <https://www.ussc.gov/guidelines/primers/aggravating-and-mitigating-role-adjustments>, was published.

⁴² The Regulatory Provisions of the Mexican Competition Law (FECL) establish the general criteria for setting fines. In Article 181, it is stated that for calculating the damage caused by a breach of the FECL, the competition authority (COFECE) may consider the market situation that would have prevailed in the absence of unlawful conduct. Termination of the violation is one of the factors considered to determine the market situation.

⁴³ Antimonopoly Act 7-2 (6).

⁴⁴ A high fine may lead the violator to bankruptcy, which in turn can cause a reduction in the number of active competitors in the relevant market.

⁴⁵ For instance, the United States uses the value of commerce affected by the infringements instead of turnover.

⁴⁶ Id.

⁴⁷ This issue on the parental liability has potentially substantial impact on the fining methodologies in terms of not only the maximum limit of the fines but also the establishment of recidivism, and thus will be detailed in the following separate chapter.

⁴⁸ Article 63.1 of SCA provides:

1. The competent bodies may impose the following fines on the economic agents, undertakings, associations, unions or groupings of them that, intentionally or by negligence, infringe the provisions of this Act:

a) Minor infringements with a fine of up to 1% of the total turnover of the infringing undertaking in the business year immediately preceding to that of the imposition of the fine.

b) Serious infringements with a fine of up to 5% of the total turnover of the infringing undertaking in the business year immediately preceding to that of the imposition of the fine.

c) Very serious infringements with a fine of up to 10% of the total turnover of the infringing undertaking in the business year immediately preceding to that of the imposition of the fine.

The total turnover of associations, unions or groupings of undertakings shall be determined taking into consideration the turnover of their members.

⁴⁹ See Federal Sentencing Guidelines Manual §8C3.3.

⁵⁰ In Brazil, the benefits of the leniency programme are granted only to the first applicant qualified in relation to the reported infringement or an infringement under investigation. All other participants in the collusive infringement may co-operate with CADE through another type of agreement: the cease-and-desist agreement.

⁵¹ Alexandre Barreto de Souza, “Brazil’s leniency programme – 15 years in effect” – A contribution to the GCR (Global Competition Review), 7 February 2019, available at <https://globalcompetitionreview.com/article/1180067/brazil%E2%80%99s-leniency-programme-%E2%80%93-15-years-in-effect>. Alexandre Barreto de Souza has been the president of CADE since 2017.

⁵² English version available at: <https://www.indecopi.gob.pe/documents/51771/1981946/Leniency+Program+Guidelines+%E2%80%93+Peru+Indecopi/f2f8506a-90d0-3657-56b2-b3e6799ec274>.

⁵³ Most jurisdictions may also impose fines on individuals involved in the infringement of competition law. According to the ICN survey, 23 of 33 jurisdictions responded they impose anti-trust fines on individuals (see ICN, 2017), p.22.

⁵⁴ According to an ICN survey, 19 of 33 responding jurisdictions adopt, albeit with different interpretations and applications, this approach: Australia, Austria, Brazil, Bulgaria, Colombia, the European Union, Finland, Greece, Italy, Lithuania, Malaysia, Mexico, the Netherlands, Norway, Russia, Spain, Sweden, Switzerland and Turkey (ICN, 2017 p.13). Ecuador also follows this approach. See Article 79 of the competition law of Ecuador, the Spanish version of which is available at <http://www.scpm.gob.ec/images/marco-legal/LEY-Y-RLORCPM.pdf>.

⁵⁵ See Opinion of Advocate General MAZÁK in Case C-90/09 P *General Química and Others v European Commission*, para 64. Recently, the EU Court of Justice issued a judgement ruling that parent companies can be held liable for the damage caused by a competition infringement committed by their subsidiary, if the parent company (that holds all the shares in the subsidiary) has dissolved the subsidiary but continued its economic activity. (See Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy, NCC Industry Oy, Asphaltmix Oy* [2019].)

⁵⁶ CFI, 12.12.2007, Akzo Nobel NV et al./Commission, Case T-112/05, ECR 2007, II-5049, margin no. 58; the decision was confirmed by the ECJ on 10 Sept. 2009, Case C-97/08 P.

⁵⁷ Since *Akzo Nobel* case, this presumption has never been reversed in the EU Courts yet. Furthermore, the EU Courts have even gone further. First, the parent company's ownership of subsidiary needs not to be direct: indirect ownership through an intermediary company will suffice. Second, the full ownership is not required: the presumption may be triggered even where the parent company's shareholding nears but falls short of 100% (Kalintiri, 2018).

⁵⁸ According to the ICN survey, the half of 33 responding jurisdictions fine trade associations: Austria, Brazil, Bulgaria, Canada, El Salvador, Estonia, the EU, Finland, Greece, Hungary, Italy, Korea, Mexico, Norway, Russia, Singapore, Switzerland and Turkey (ICN, 2017 p.14).

⁵⁹ For example, Australia, the EU, Hungary, Japan, Malaysia, Norway and Spain (ICN, 2017, p.22).

⁶⁰ For instance, Brazil, Bulgaria, Estonia, Finland, Germany, Lithuania, Poland, South Africa, Sweden and Zambia are in this category (ICN, 2017 p.23). Korea may be also included in this category.

⁶¹ For instance, Greece, the Netherlands, Singapore and Turkey.

⁶² See the EU Council Regulation No. 1/2003, Article 23: "When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine. Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association."

⁶³ Between 1990 and 5 March 2019, the European Commission levied fines of EUR 28.8 billion for cartel violations, which was reduced to EUR 26.4 billion after the Courts' decisions. See Cartel statistics of the European Commission, available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

⁶⁴ The Spanish version of the competition law of Ecuador is available at <http://www.scpm.gob.ec/images/marco-legal/LEY-Y-RLORCPM.pdf>.

⁶⁵ Between 2008 and 2014, the SIC imposed due and payable fines totalling COP 297.83 billion (USD 1.252 billion), of which 48% was collected (COP 146.41 billion, around USD 615.71 million) (OECD, 2016j, p. 63).

⁶⁶ According to the 2017 ICN survey, 19 of 33 responding competition agencies indicated that they use settlement procedures for cartel cases, either directly, or in their submissions to the Court: Australia, Austria, Brazil, Canada, Colombia, Estonia, the European Union, Germany, Greece,

Hungary, Israel, the Netherlands, Norway, Poland, South-Africa, Sweden, Switzerland, the US and Zambia (ICN,2017, p.51).

⁶⁷ Also, in a system where not all defendants settle in practice (so called “Hybrid Settlement”), settlement can be used as a tool to facilitate the investigation against the remaining parties in cartel by making co-operation a requirement for the settlement in progress.

⁶⁸ The amount of reduction in fines provided to settling parties varies among jurisdictions. For example, it is 10% in the EU, 15% in Greece, 30% in Hungary and up to 50% in Brazil (ICN, 2017, p. 51).

⁶⁹ While settlement and leniency are not mutually exclusive in most jurisdictions, they serve different purposes: leniency is an investigative tool to uncover information on cartel conduct, but settlement is for procedural efficiencies.

⁷⁰ In Brazil, the settlement procedure applies to abuse of dominance cases as well as cartels. However, there exist a few differences in abuse of dominance cases compared to cartels: (i) the filing of a settlement proposal does not implicate an admission of the facts nor of the wrongfulness of the investigated conduct; (ii) it is not necessary to offer a pecuniary contribution to the Fund of Diffuse Rights. See (OECD, 2019 p. 81).

⁷¹ If the settlement proposal is presented while the case is still at the General Superintendence, there are four pre-defined discounts for pecuniary contributions. The first defendant in a cartel investigation to execute a settlement agreement will have a discount of between 30%-50% of the applicable fine; the second one, from 25%-40%; from the third defendant onwards, the discount shall not be higher than 25% of the applicable fine. For settlement proposals submitted after the General Superintendence has concluded the investigation and forwarded the case to the Tribunal, reductions will be no greater than 15%.

⁷² The alleged offender is supposed to offer settlement conditions before expiration of the 20-day period for submission of evidence. This requirement was added into the Colombian competition law in 2009 with the enactment of Law 1340. Before that time, an alleged offender could make a settlement offer at any point.

⁷³ More detailed information may be available at the webpage of the European Commission: http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html

⁷⁴ See Scott D. Hammond, The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All, address before the OECD Competition Committee, Working Party No. 3 (17 October 2006), available at <http://www.usdoj.gov/atr/public/speeches/219332.pdf>.

⁷⁵ The right to be provided an effective remedy and to a fair trial is guaranteed by Article 6 of the European Convention of Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights (CFR).

⁷⁶ Case T-98/14 - *Société Générale v Commission*, OJ C 142/36, 12.5.2014. Since *Société Générale* had already admitted liability during the settlement procedure, it did not challenge the core facts of the case nor the legal assessment by the Commission.

⁷⁷ Order of the President in Case T-98/14 - *Société Générale v Commission*, OJ C 136/44, 18.4.2016.

⁷⁸ Application in Case T-95/15 – *Printeos and Others v Commission*, OJ C 127/36, 20.4.2015. Like the above *Société Générale*’s appeal, *Printeos* did not contest its participation in the cartel.

⁷⁹ Case T-95/15 *Printeos v Commission*, judgement of the General Court of 13 December 2016.

⁸⁰ Cases T-758/14 *Infineon Technologies AG v Commission* and T-762/14 *Koninklijke Philips NV and Philips France v Commission*, judgements of the General Court of 15 December 2016. See Laina, F. and A. Bogdanov (2017) for details.

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