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Subgroup 1 – general framework

SETTING OF FINES FOR CARTELS IN ICN JURISDICTIONS (2017)

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1. INTRODUCTION

In 2008, Subgroup 1 of the ICN CWG published the report on fines, “SETTING OF FINES FOR CARTELS IN ICN JURISDICTIONS”.

The setting of fines on cartels was a topical subject around 2008, and seems to be equally topical in 2016 because there is little consensus on the appropriate level of fines. As an increasing number of jurisdictions are actively tackling international cartels, the method for calculating fines across multiple jurisdictions is a subject of discussion among competition enforcers, academics, and private practitioners. The issue of determining fines was also a topic at the 2016 ICN cartel workshop in Madrid.

The 2008 report on fines examined in detail issues linked to principles and methodologies adopted by different jurisdictions for determining fines. It covered issues such as:

- Objectives and “philosophy” behind the imposition of fines;
- Role of competition agency in setting fines;
- Addressees of sanctions;
- Transparency of fine-setting methodologies in general and transparency regarding individual cases;
- Basis for calculations (Percentage of turnover/volume of commerce/market shares/illicit gain);
- Aggravating elements (duration, recidivism, ring-leadership, refusal to cooperate);
- Mitigating elements (effective cooperation, immediate termination, limited participation, negligence);
- Maxima / Minima of the fine imposed;
- Leniency and Inability to pay;
- Interactions with direct settlement.

In the 2016-2017 ICN year, the Cartel Working Group decided to update the information in the 2008 report, and to add information on actual examples of the calculation, since we have seen significant developments in fine-setting methodology and actual cases since the 2008 report on fines was published.

The procedure for the work project involved the classic ICN tool, a questionnaire to agencies (members of the cartels Working Group.)¹ 33 agencies² contributed answers to the questionnaire, representing the following jurisdictions: Australia, Austria, Brazil, Bulgaria, Canada, Colombia, El Salvador, Estonia, the European Commission, Finland, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Korea, Lithuania, Malaysia, Mexico, the Netherlands, Norway, Poland, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the US and Zambia.³

Although this total of 33 agencies falls far short of the majority of ICN member agencies, their responses should represent a majority of the cartel cases brought to conclusion in the ICN, and they are those ICN

¹ See Appendix 2 for the questionnaire used.

² Twenty-two competition agencies replied to the questionnaire for the 2008 report on fines.

³ The replies to the questionnaire were not intended for publication, and are therefore not annexed to this report.

member agencies which have been actively tackling cartels, therefore they can be considered as a representative sample.

The following agencies took part in the drafting of this report: the Japan Fair Trade Commission, the Hungarian Competition Authority (Gazdasági Versenyhivatal) and the Netherlands Authority for Consumers and Markets. This report is submitted to the 16th annual ICN conference, in Porto, Portugal, in May 2017, in the hope that it will be found useful, not only by those simply seeking information about methods for determining fines, but in particular by jurisdictions revising their legislation or guidelines on fines, or introducing fines for cartels for the first time.

2. PRELIMINARY ISSUES

The law which empowers the sanctioning of cartels with fines (and/or other sanctions) in a jurisdiction can form part of criminal law, administrative law, or civil law. However, in certain jurisdictions the distinction between these categories of law is more hard-and-fast than in others. In Switzerland, for example, administrative sanctions have a penal character.⁴ The definition of cartels as a particular kind of offence does not necessarily impact on the methodology for setting fines (although it probably will determine which authority sets the fine).

This chapter covers four basic issues of organisation and principle regarding fines:

1. What is the basic “philosophy” or objectives of fines in the responding jurisdictions;
2. What is the legal basis for imposing fines in the jurisdiction in question;
3. Which authority determines the amount of the fine;
4. Are fines (on companies or individuals) the only weapon in the arsenal against cartels in the jurisdiction in question, or are there others?

2.1 Objectives and “philosophy” behind the imposition of fines

In 2005, the ICN cartels working group presented to the ICN annual conference in Bonn, a report entitled “Building blocks for effective anti-cartel regimes”, including a section on Effective Penalties.⁵ It should be mentioned at the outset that the economic underpinning of fines, and the concept of the “optimal” fine was covered in this 2005 ICN report. However, the link between the theory of optimal fines for deterrence, and actual methodologies used to set fines is often tenuous, partly because the statistical information needed to set fines at an economically optimal level (amount of excess profit gained, likelihood of detection) is very difficult to obtain.

Several competition authorities noted that their fining policy in cartel cases pursues multiple goals (deterrence, retribution, recovery of excess cartel profits), and these are not mutually exclusive. Having said this, the vast majority of responding agencies have indicated that fines are intended to deter the addressees from engaging in the same illicit conduct in the future (i.e. specific deterrence), as well as to

⁴ Sanctions pursuant to the Swiss Law are regarded as administrative fines having, however, due to their amount both preventive and repressive purposes. Therefore they are qualified as administrative fines having a penal character.

⁵ ISBN 92-894-6737-1. Available on the ICN website, at the following URL:
http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf

dissuade other potential infringers from forming or joining anticompetitive cartels (i.e. general deterrence)⁶. Some agencies mentioned other aims⁷ in addition to deterrence, others did not.

For example, a number of agencies have also mentioned the need to punish the corporate cartel participants of the infringement,⁸ while a few respondents referred to the objective of recovering any unlawful gains obtained by the cartel participants at the expense of their customers.⁹ Finally, the US and Malaysian 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

Pursuant to its 2006 guidelines, the European Commission “*will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount*”.¹¹ In Brazil, it is an important purpose of the sanctioning to compensate damages caused by, among other things, violations to the economic order. In Hungary, the level of the fine may be raised to three times the illegal gains made by the undertaking concerned, whenever this latter amount is higher than the fine otherwise calculated. The Swiss agency considers particularly high profits made through the infringement as an aggravating factor and in any case it will increase the fine in order to exceed the illicit gains. Although the Italian legislation does not set any legal minimum, the amount of the fine should be higher than the profits expected by the undertaking through the unlawful conduct.¹² Illicit gains of the offender must also be considered by the Austrian court when setting the amount of the fines.

⁶ Deterrence (either general or specific) has been identified as one of the overarching objectives of the fining policy by the agencies of the EU, the US, Australia, Canada, Japan, Germany, the Netherlands, Hungary, Ireland, Italy, Austria, Norway, Switzerland, Russia, Brazil, Bulgaria, Colombia, El Salvador, Estonia, Finland, Greece, Israel, Latvia, Malaysia, Mexico, Russia, Korea, Singapore, South Africa, Spain, Sweden, Turkey, Zambia.

⁷ The Mexican Competition Authority mentioned as a general deterrence aim that in case of recidivism, fines may increase to the double of the original amount determined by the Mexican Competition Commission. Furthermore, it may order the divestiture of specific assets, rights, partnership interest or stock in the proportions necessary to eliminate any anticompetitive effects caused. As an individual aim to deter companies and individuals from the cartel infringements, the Mexican Authority mentioned the increasing caps of sanctions, and the establishment of disqualifications and criminal penalties.

⁸ For instance Australia, the EU, the US, Germany, Hungary, Ireland, Switzerland, Korea, Italy, Austria, Brazil, Colombia, El Salvador, Estonia, Greece, Israel, Japan and the Netherlands.

⁹ The recovery of illicit gains has been indicated as an objective of the fining policy in cartel cases by the German, Japanese, the US and the Turkish agencies (in combination with deterrence and punishment). In Korea, the recovery of illicit gains is quoted as the main objective of the fining policy, alongside with punishment.

¹⁰ Restitution is the concept of victim recovery. When a court or institution orders restitution it orders the defendant to make victims whole. Retribution is a concept of retributive justice, a theory of justice that proportionate punishment is an acceptable response to crime, regardless of whether the punishment causes any tangible benefits for the victim.

¹¹ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, Official Journal C210,1.9.2006, paragraph 31.

¹² Pursuant to paragraph 8 of the Guidelines issued by the AGCM on the method of setting fines for infringements of competition rules.

Chart A: Objective of Fines¹³

| Deterring the sanctioned companies or individuals from repeating the same conduct in the future | Deterring other companies or individuals from starting a cartel or to join a cartel | Recovering the unlawful profits obtained by the cartel for the victims of the cartel | Punishment (i.e. recovering unlawful profits plus an additional fine) |
|--|--|---|---|
| AU, AT, BR, BG, CA, CO, SV, EE, EU, FI, DE, GR, HU, IE, IL, IT, JP, KR, LT, MY, MX, NL, NO, PL, RU, SG, ZA, ES, SE, CH, TR, US, ZM | AU, AT, BR, BG, CA, CO, SV, EE, EU, FI, DE, GR, HU, IE, IL, IT, JP, KR, LT, MY, MX, NL, NO, RU, SG, ZA, ES, SE, CH, TR, US, ZM | DE (discretionary), KR, MY, US | AU, AT, BR, CO, SV, DE, GR (conditional), HU, IE, IL, JP (only in criminal cases), KR, NL, CH, US |

In Germany, the objective to recoup any economic benefit a cartel member may have derived from the infringement is kept logically distinct from the process of quantifying antitrust fines for punishment purposes. The competition agency is entrusted with the power to skim off illicit gains either in the main proceedings leading to the imposition of the fine or in separate proceedings. If the authority decides to confiscate excess profits in the context of the main proceedings, the total sum due may well exceed the statutory cap set for antitrust fines. The recovery of unlawful profits obtained by the cartel is, however, optional. The decision to recover unlawful profits lies at the discretion of the German competition authority. The disadvantage of such a calculation method is that the standard for proving the exact amount of the illicit gain is high and the underlying data is not easy to obtain. Thus, in cases where the authority expects private damage claims or has limited resources due to other parallel proceedings, it usually decides against skimming of illicit gains in addition to the imposition of fines. The Irish Authority noted that criminal sanctions do not facilitate the recovery of the cartel profit for its victims. In Poland, the fine imposed by the UOKiK is at least twofold and consists of both 1) retribution and 2) deterrence, but also prevention and education.

Punishment appears as an objective in the fining system of numerous jurisdictions, but not necessarily as increasing the recovery of the unlawful profit with an additional fine. For example, in Australia, the Crimes Act requires the court, when passing a sentence, to have regard to the need to ensure that the person is adequately punished for the offence in criminal proceedings. In Greece, punishment may be deemed as an objective, only if it might be substantiated. In Ireland, while the general objective is deterrence, punishment for the undertaking/individual for the crime is a specific objective. In Japan, punishment is regarded as an “objective of criminal fine”. In Korea the main objectives are recovering unlawful profits obtained by the cartel participants and imposing an appropriate penalty.

2.2 Legal basis for imposing fines

Although all of the jurisdictions referred to in this report have competition laws, sometimes the legal basis for imposing fines is found elsewhere in addition to the competition law itself. For example, in Russia, the legal basis for fining is found in the Russian Competition Act¹⁴ and in the Code of

¹³ See Appendix 1 for the names of jurisdictions abbreviated in this chart.

¹⁴ Federal Law of the Russian Federation “On Protection of Competition”.

Administrative offence (which was modified only in 2009 to introduce fines for competition infringements and the Criminal Code). Member States of the EU are in the unique position of having two legal bases for sanctioning cartels, their national competition law, and, Article 101 of the Treaty on the Functioning of the European Union (TFEU).¹⁵ Certain national competition laws have been amended on several occasions, to change the nature of the sanctions imposed on cartels; for example, the Irish competition law was amended in 2012, to increase the level of competition fines. In Estonia, since 2010, it is possible to punish a legal person with a pecuniary punishment of 5 to 10 percent of the turnover of the legal person.

In Canada significant amendments were made to the Canadian Competition Act in 2009, including to the maximum terms of imprisonment for conspiracy and bid-rigging. When the maximum terms of imprisonment for these offences was increased to 14 years, they were brought in line with the terms of imprisonment available for the most serious kind of fraud prohibited by the Criminal Code. In Japan and in Korea, the system of “surcharges”, imposed by the competition agency, was introduced only many years after the competition law itself was adopted (1977 in Japan, 1987 in Korea). In Japan, criminal fines were introduced in 1947 and could be imposed by courts on the condition that the competition agency filed an accusation; likewise in Korea, courts have been able to impose criminal fines since 1981. In both jurisdictions, the introduction of a system of “surcharges” led to fines being imposed on cartels more frequently, given the rarity of courts imposing criminal fines.

2.3 Role of the competition agency in setting fines

As regards the role of the competition agencies in the decision-making about fines, there are three categories. The first and most numerous one is when a competition agency which sets the fine itself. This is the case in 23 out of 33 responding jurisdictions, namely in Bulgaria, Brazil, Colombia, El Salvador, the European Commission, Germany, Greece, Hungary, Italy, Japan, Korea, Lithuania, Malaysia, Mexico, the Netherlands, Norway, Poland, Russia, Singapore, Spain, Switzerland, Turkey and Zambia.

Jurisdictions where there is a dual competition authority, with a competition agency carrying out investigations and a specialised competition court taking decisions and imposing sanctions, fall into the second category. Austria, Sweden, and South Africa belong to this category. (Brazil is specific from this point of view, since there a higher agency takes fining decisions.)

Forming the third category, in some jurisdictions, it is a non-specialised court which adjudicates in competition cases. This is the case of Australia, Canada, Ireland, Estonia, Finland, Israel, and the US. These are sometimes, but by no means always, jurisdictions in which sanctions are criminalised. In the US and Canada, hard-core cartels are prosecuted as criminal offences, and sentences are imposed by courts.¹⁶ In the US, the Antitrust Division of the DOJ criminally prosecutes cartel conduct and generally seeks criminal fines for culpable corporations and imprisonment and criminal fines for culpable individuals. While the Antitrust Division charges and prosecutes cartel conduct and can recommend particular criminal sentences, the federal courts ultimately determine the appropriate sentence, including the amount of any fine. In Canada, the Bureau’s role in determining fines in cartel cases is primarily to make a recommendation to the Public Prosecution Service of Canada as to sentence. The final discretion with respect to any sanctions imposed, however, rests with the courts. The Lithuanian regime

¹⁵ There is however, no choice: national competition law is applied where the effects of the practice are domestic only, and EU law must be applied in cases where an infringement has an effect on trade between Member States.

¹⁶ In the US, a certain type of negotiated settlement in a cartel case (described in the United States Federal Rules of Criminal Procedure at Rule 11(c)(1)(C)) requires that once a court accepts the agreement, the court must impose the fine or fine range specified in the agreement.

differentiates between sanctions on undertakings and on individuals. In this system the imposition of sanctions on an individual is dependent on a decision against an undertaking – the Competition Council (CC) adopts a decision only against an undertaking, but if the CC considers that a sanction should be imposed on an individual as well, the CC has to apply to the administrative court and the final decision to impose a fine on an individual is made by the court. This is somewhat similar to the solution applied in Russia. According to Russian law, the Federal Antimonopoly Service (FAS Russia) independently calculates administrative fines in cases of competition law violations. In cases, when FAS Russia also finds the features of the criminal offence, all the materials of the case are transferred to the Ministry of Internal Affairs/Investigative Committee of the Russian Federation and, the final amount of fine is assessed by the court. The Australian Competition and Consumer Act 2010 (CCA) provides for both civil prohibitions and criminal offences. In both civil and criminal prosecutions of cartel cases, it is the court that determines and imposes fines on infringing parties and makes orders for other remedies.

Chart B: Who Sets Fines?¹⁷

| | |
|--|--|
| 1. competition authority sets the fine | BR, BG, CO, SV, EU, DE, GR, HU, IT, JP, KR, LT, MY, MX, NL, NO, PL, RU, SG, ES, CH, TR, ZM |
| 2. specialised court sets the fine | AT, ZA, SE, |
| 3. non-specialised court sets the fine | AU, CA, EE, FI, IE, IL, US |
| ”intermediate” jurisdictions | AT, BR, GR, HU, IE, IL, JP, KR, MX, PL, RU |

Finally, there are “intermediate” jurisdictions, in which a cartel may be sanctioned either with criminal penalties or with civil or administrative penalties, and the choice of sanction determines both the procedure and the sanctioning authority (see the last row of Chart B). Japan and Korea fall into this category: in those jurisdictions, the competition agencies can determine “surcharges” (non-criminal penalties), while if the cartel is treated as a criminal offence, a court will determine the sanction.¹⁸ In Brazil too, criminal and administrative enforcement are totally separate, with administrative fines set by CADE, one of the competition agencies, and criminal penalties (including criminal fines) set by courts. In Hungary, since September 2005 the law has foreseen the possibility of imposing criminal sanctions for certain types of hard-core cartels (public procurement and concession procedures), thus potentially allowing Hungary to be classified in this category too. In Ireland the competition authority has mainly an investigatory function regarding cartel enforcement. As regards sanctions, the Irish Competition Authority may recommend that the Director of Public Prosecutions (DPP) file charges on indictment against undertakings and individuals for breaches of the competition law. The DPP has sole discretion to file charges on indictment for crimes committed within the State. The final decision is wholly at the discretion of the courts. Mexico is somewhat similar. The administrative trial-like procedure is carried out before the Federal Economic Competition Commission, which imposes the administrative fine.

¹⁷ See Appendix 1 for the names of jurisdictions abbreviated in this chart.

¹⁸ In fact, Japan and Korea provide two types of administrative sanctions (corrective measures order and surcharge) and two types of criminal sanctions (imprisonment and fine).

Nonetheless, after concluding the investigation and before the conclusion of the trial-like procedure, the Commission can file a criminal complaint before the public prosecutor office to start a criminal procedure; the public prosecutor’s office then conducts its own investigation and, if elements are found, can press charges against individuals before a criminal court. In this order of ideas, both the criminal investigation and the eventual sentencing (which could involve both prison and criminal fines) are done by different authorities: the public prosecutor and the criminal judge, respectively. In Austria, only bid rigging cases are decided by the criminal court, all other competition cases are decided by a specialised cartel court.

2.4 Position of fines in the “arsenal” of sanctions on cartels

The position of fines as the only sanction against cartels or one of a panoply of sanctions can potentially have an important impact on the approach to determining the amount of the fine. Where fines are the only sanction, they must bear the entire burden of deterrence, and a priori may need to be higher than in jurisdictions where they are combined with other sanctions.

Chart C: Panoply of Sanctions¹⁹

| | Jurisdiction |
|---|--|
| 1a. Fine (administrative) | AU, AT, BR, BG, CO, SV, EU, FI, DE, GR, HU, IL, IT, JP, KR, LT, MY, MX, NL, NO, PL, RU, SG, ZA, ES, SE, TR, ZM |
| 1b. Fine (criminal) | AU, BR, CA, EE, GR, HU, IE, IL, JP, KR, MX, NO, CH, US |
| 1c. Fine only | BG, EU, IT, MY, NL, SG, CH, TR |
| 2. Administrative fine on individuals | BR, DE, GR, LT, MX, NL |
| 3. Imprisonment of individuals (criminal) | AU, AT, BR, CA, CO, EE, DE ²⁰ , GR, HU ²¹ , IE, IL, JP, KR, MX, PL, RU, ZA, US, ZM |
| 4. Disqualification of individuals | AU, BR, IE, IL, LT, MX, RU, SE |
| 5. Exclusion from calls for tender | BR, CO, SV, FI, DE, GR, HU, JP, KR, MX, NO, PL, ES, SE, US |
| 6. Combined ²² | AU, AT, BR, CA, CO, SV, EE, FI, DE, GR, HU, IE, IL, JP, KR, LT, MX, NO, PL, RU, ZA, ES, SE, US, ZM |

¹⁹ See Appendix 1 for the names of jurisdictions abbreviated in this chart.
²⁰ Only in bid rigging cases where the public prosecutor can request custodial or pecuniary sanctions on the involved managers in a criminal proceeding.
²¹ Only in bid rigging cases.
²² ”Combined” means that fines are not the only sanction, but they are combined with other sanctions. In some jurisdictions sanctions other than fines may be imposed by the competition authorities, while in other

| | |
|------------------------------|---|
| 7. Civil actions for damages | AU, BR, CA, CO, EU ²³ , DE, HU, MX, NL, US |
|------------------------------|---|

In all of the agencies responding to the questionnaire fines are available as a sanction; no responding agency has other sanctions available but not fines. Almost one-fourth of the agencies (8 out of the 33 responding jurisdictions, agencies of Bulgaria, the European Commission, Italy, Malaysia, the Netherlands, Singapore, Switzerland and Turkey) indicated that fines (on companies and/ or individuals) are the only sanction available to them. The modus of the fine level is 10% for maximum fines.

In Brazil, it might be much higher. According to the Brazilian fining policy, CADE may sanction companies involved in cartels with fines that range from 0.1 to 20 per cent of the company's turnover in the fiscal year preceding the beginning of the administrative proceedings and individual managers responsible for unlawful corporate conduct may be fined an amount ranging from 1 to 20 percent of the corporate fine. Other individuals, or public and private entities that do not perform business activity, may be fined from BRL 50,000 to BRL 2 billion (from €14,900 to €595 million). In El Salvador the sum of the maximum fine is a complex measure. The Competition Superintendence may impose – as maximum – a fine up to six percent of the annual sales obtained by the infringer, or up to six percent of the value of its assets during the preceding fiscal year, or a fine equivalent to at least twice, and up to a maximum of ten times, of the estimated profits resulting from the anti-competitive practices, whichever is higher.

Incarceration of individuals involved in the cartel is available in the following jurisdictions: Australia, Austria (for bid rigging only), Brazil, Canada, Colombia (for bid rigging only), Germany (for bid rigging only), Estonia, Greece, Hungary (for bid rigging only), Ireland, Israel, Japan, Korea, Mexico, Poland (for bid rigging only), Russia, South Africa, the US and Zambia. However, in some of those jurisdictions, the penalty of incarceration has never been imposed.

In jurisdictions which have introduced incarceration as a sanction, or which have been able to incarcerate individuals for some time, the primary reason for the introduction of this sanction has been the aim of increasing effective deterrence by focusing the attention of company managers on the extreme personal consequences of participating in cartels.²⁴ It is sometimes felt that fines on companies affect in the first place shareholders, who are not involved in the daily running of a company, and thus may have limited effect on the behaviour of managers.

On the other hand, the European Commission considers that effective deterrence can be achieved through pecuniary sanctions, but only if these are sufficiently high, especially for recidivists.²⁵ This is borne out in the level of fines imposed by the European Commission. The highest cartel fine which it has ever imposed on a single company is €1 billion (imposed on Daimler in 2016 in the "Truck producers' case").²⁶ However, it should be pointed out that the US, which also has imprisonment as a sanction, has

jurisdictions sanctions other than fines are imposed by other bodies (like e.g. public procurement bodies or criminal courts).

²³ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union; OJ L 349, 5 December 2014. This directive had to be transposed into national law by 27 December 2016. In its Article 3 "Right to full compensation" it provides that "Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm."

²⁴ Prison terms available for cartel offences vary to a great extent, from a maximum of 3 years (e.g. in Austria, Estonia, Korea, Poland) through a maximum of 5 years (e.g. in Brazil, Greece, Hungary, Ireland, Japan, Zambia) till up to 12 years (Colombia). The highest possible duration of the incarceration is 14 years, in Canada.

²⁵ The 2006 fining guidelines of the European Commission allow fines to be increased by 100% in the case of recidivists.

²⁶ See European Commission cartel statistics page: <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>

imposed a fine on Citicorp of \$925 million, for its role in the foreign exchange cartel. The highest cartel fines reported by other jurisdictions were of a lower order.²⁷

Although fines and incarceration are the most widely-applied sanctions, a wide range of other sanctions also exists in different jurisdictions. The Japanese and Korean systems differentiate between surcharge, which is an administrative action, and fine, which is a criminal one. Both the surcharge and the fine can be imposed on the same companies, in the same cartel cases.

Disqualification of the individual who acted on behalf of the company is possible also in eight responding jurisdictions (Australia, Brazil, Ireland, Israel, Lithuania, Mexico, Russia and Sweden).²⁸

In 15 jurisdictions, rules on public procurement also enable a contracting authority to exclude a tenderer who has taken part in an anti-competitive agreement (this is the case in Brazil, Colombia²⁹, El Salvador, Finland, Germany, Greece, Hungary, Japan, Korea, Mexico, Norway, Poland, Spain, Sweden and the US). In general, the competition authorities do not take part in that process, but the public contracting authorities can order such exclusions (like e.g. in Germany). In Japan, although there is no regulation with regard to the disqualification of an enterprise which has committed a cartel for an official bid/public tender, most national and local governments have their own rules to disqualify a person who violated the Antimonopoly Act from participating in an official bid/public tender. In Hungary, such an exclusion by a contracting authority is mandatory under Hungarian public procurement laws.

In Australia, in addition to fines and imprisonment, the court may order other types of sanctions, like injunctions, declarations, community service, probation orders, adverse publicity orders, implementation of a compliance program, and disqualification of a person from managing a corporation.

Moreover, civil damages actions (under civil law) by the injured parties of a cartel may be also available (whether these are regarded as sanctions or not is a moot point). Recovery of damages for their monetary loss, either in the course of the enforcement proceeding by the competition authority or separately in a civil action, is also possible. To be successful, claimants have to be able to prove the damage they suffered and the causality with the cartel, which often may not be that easy. Private actions are mainly used in Brazil, Canada, Colombia, Germany the Netherlands and the US. It should be noted however, that irrespective of the replies sent to the questionnaire, by 27 December 2016 all the EU Member States will have to implement Directive 2014/104/EU of the European Parliament and of the Council on “certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union”. The incorporation of the provisions of this directive to the national laws of the EU Member States means that from 28 December 2016 private enforcement of competition law (at least the provisions of the EU competition law) ought to be easier than before in EU Member States (at national level, since in the EU damages cases are brought in the Member States, and not in the EU courts) as the EU Member States transpose the Directive into their national law.³⁰

²⁷ For example: in Canada: C\$48 million (around €32 million), in Japan ¥13 billion (around €92 million), in Korea 199 billion won (around €114 million).

²⁸ The length of the disqualification varies, e.g. in Israel and Lithuania it might be 5 years.

²⁹ In Colombia, disqualification from procurement (up to eight years) proceedings applies only to bid rigging cases in criminal proceedings.

³⁰ As of January 31 2017, 21 out of the 28 EU Member States have not transposed the Directive into national law.

3. ADDRESSEES OF SANCTIONS AND TRANSPARENCY

This chapter covers two further issues of relevance before entering into the details of the process and methodology of determining the fine, namely, the entity on which the fine is imposed (the addressee of the fine), and the issue of transparency, that is, how much information is made available publicly by an agency about how its fines are determined in general, and how they have been determined in specific cases.

3.1 Addressees of sanctions

The divergence in nature and kind of sanctions imposed for cartel infringements by different jurisdictions can partly be explained by the nature of the enforcement system, be it criminal or administrative. However, within the same type of system, differences can also be observed as to various addressees upon which the coercive measures may be imposed. The approach generally adopted in all systems covered in this report is to impose sanctions, mainly fines, on specific undertakings engaged in unlawful agreements; in other words, the undertakings directly participating in the cartel meetings or contacts. The competition rules of most jurisdictions provide competition agencies or courts with the possibility to impose fines or other pecuniary sanctions on undertakings found to have participated in cartels.

However, the entities subject to fining, and therefore the meaning of the term “undertaking” as used below, differ between jurisdictions, and range from specific corporate bodies or named individuals, to a group of companies found to be associated with or linked to each other.

In the EU, for example, an undertaking can include several different legal entities which by virtue of their structural and contractual links operate as a single economic unit in a specific market. The corollary of this definition is that when attributing liability for an infringement in a cartel case several legal entities belonging to the same undertaking may be held liable for the infringement. For example in the case of a group, a parent company can be held (jointly and severally) liable for the conduct of one of its subsidiaries, when the parent was capable of determining the commercial policy pursued by this subsidiary, i.e. when this subsidiary did not independently determine its conduct in the market. The described approach has been adopted, albeit with different interpretations and applications, by more than half of the jurisdictions that responded to the questionnaire; Australia, Austria, Brazil, Bulgaria, Colombia, the European Union, Finland, Greece, Italy, Lithuania, Malaysia, Mexico, the Netherlands, Norway, Russia, Spain, Sweden, Switzerland and Turkey.³¹

The first consequence of such an approach, for the European Union, is that part of the investigation has to focus on a detailed reconstruction of the structure of the group for the period in which the cartel existed. Under EU law, a company holding 100% (or very close to 100%) of the shares of another company, is presumed to be responsible for the conduct in the market of its subsidiary. The former is presumed to be in control of the latter (according to case-law: to be capable of exercising or to have exercised decisive influence over the subsidiary’s commercial policy). Such presumption can be rebutted and it is for the companies to provide evidence supporting a rebuttal. After the identification of the companies belonging to the undertaking at the time of the activity of the cartel, the European

³¹ In Germany, the adoption of this approach is part of a current government draft for an amendment to the GWB, the German competition law regime.

Commission may also have to determine who their legal or economic successors are, for instance where a company has been dissolved, gone into bankruptcy, or been acquired by another corporate group.

The second consequence of such an interpretation of the concept of undertaking is that any maximum statutory limits for fines apply to the undertaking as a whole and not to the individual companies. As regards the EU, the fine imposed (before applying leniency) cannot exceed 10% of an undertaking's turnover, in this case therefore meaning the turnover of the undertaking as a whole. This avoids the possibility that large groups which (intentionally) participate in cartels via one of their very small subsidiaries benefit from the lower maximum statutory limit of the fine.

In half of the responding jurisdictions, agencies or courts can also fine trade associations which committed the infringement. Austria, Brazil, Bulgaria, Canada, El Salvador, Estonia, the European Union, Finland, Greece, Hungary, Italy, Korea, Mexico, Norway, Russia, Singapore, Switzerland and Turkey are examples.³²

However, in several jurisdictions, agencies or courts can also fine natural persons, i.e. the specific individual who committed the infringement, in addition to fining the undertaking and the trade association. The logic behind these systems is that the imposition of sanctions only on the undertaking cannot ensure adequate deterrence.

Undertakings are inevitably engaged in cartels through the conduct of their representatives who are natural persons (individuals). Sanctions imposed on individuals can therefore complement fines imposed on corporations/undertakings and enhance deterrence.

For this reason, several jurisdictions provide their responsible authorities with the possibility to impose fines on natural persons involved in cartel conduct. This approach has been adopted in Australia, Brazil, Bulgaria, Canada, Colombia, Estonia, Finland (fine for procedural breaches can be imposed only on individuals), Germany, Greece, Ireland, Israel, Japan, Korea, Lithuania, Mexico, the Netherlands, Norway, Poland, Russia, Spain, Switzerland, Turkey, the US and Zambia.

In Switzerland, a pecuniary sanction may be imposed on specific individuals if they control, besides the company relevant to the investigation, another company by participating in the economic process (there has never been such a case.).

In Turkey, it is possible to impose a fine on executives or employees of the undertaking or association of undertakings who are detected to have had a determining impact on the violation, which amounts to up to 5% of the substantive fine imposed on the undertaking or association of undertakings.

3.2 Transparency

The issue of transparency is not only related to good enforcement practice and openness of information but also to other factors such as the relationship between the predictability of sanctions and deterrence.

According to the principle “*nullum crimen et nulla poena sine lege*”, for conduct to be considered as a crime/offence, there must be a legal provision establishing it and imposing a specific punishment on the perpetrators of such conduct. In cartel cases, the imposition of a specific punishment will affect

³² See below Section 4.3.

deterrence of cartel conduct. If a company could determine in advance the amount of the fine which would be imposed on it for any particular cartel offence, it could take a rational decision about whether or not to become involved in a cartel.

Under a rather simple cost-benefit analysis, the company and the executives acting on its behalf could determine in which circumstances or conditions it would be economically sound to enter a cartel or to stay in it.

Corporate executives will be deterred from committing cartel offences if they perceive that the potential costs of engaging in the conduct exceed the anticipated rewards. Brazil, Canada, the EU and the US, take the view that optimal deterrence is achieved where there is a threat of severe sanctions, coupled with a significant fear of detection. In such jurisdictions, where sufficiently high sanctions are available, the higher the degree of certainty with respect to how fines are determined, the less likely companies and their executives will engage in cartel conduct. In turn, self-reporting of such conduct after it has occurred is more likely because their knowledge of their potential exposure to penalties will be more predictable.

Other jurisdictions take the approach that a certain degree of uncertainty (or non-transparency) about the fine-setting process can prevent such a rational decision-making process in a company and therefore make such determination less predictable.

One of the downsides of this approach is of course, that uncertainty (also called discretion) has to be justified before the bodies that approve the agency's proposal or review the agency's decision, whatever the applicable case is. Therefore, the less discretion in determination of fines by the agency, the lower the degree of litigation on the amount of the fine by companies or individuals who have been fined.

Enforcers in jurisdictions where there is uncertainty as to how fines are determined may also face public criticism of their fining system as subjective or arbitrary.

Two aspects of transparency were dealt with the questionnaire: general transparency (regarding the process of determination of fines in general) and specific transparency (concerning individual cases).

3.2.1 Transparency on fine-setting methodologies in general

The questionnaire asked whether agencies have any public document explaining their methodology to determine fines or guidelines accessible to public in their jurisdictions. In the case of a negative answer, competition agencies were asked to explain whether they have any other public sources of information concerning this issue.

In some jurisdictions, where fines can be imposed by courts at their discretion (which may depend on the type of case, criminal or administrative), there are no guidelines or methodology on setting fines available to the public. Austria, Ireland and Estonia are examples.

On the other hand, Finland, South Africa, Sweden and the US have such guidelines. In the US, fines are imposed by courts and the U.S. Sentencing Guidelines set out advisory sentencing guidance for the sentencing of convicted defendants in the US federal court system, including those convicted of antitrust offences. In the absence of sentencing guidelines, the sentencing in Canada is based on the Competition Act, case-law and Criminal Code; the Leniency Program Bulletin and FAQ of Leniency

Program are published to respond to this lacuna (2010). In Austria, the sentencing is based on the Competition Act, and additionally the Competition Authority follows the methodology laid out in the Guidelines of the European Commission. In Australia, a series of common law precedents provide guidance to the judiciary for determining appropriate penalty.

In some jurisdictions³³, there are no guidelines available, even though the fine is set by the agency. In such cases, there is a legal limitation to the amount of fines the agency can impose (e.g. Russia).

In Japan, the criteria for the determination of fines are all stipulated in the Antimonopoly Act and Cabinet Order, which are accessible to the public. Guidelines are therefore considered unnecessary.

In El Salvador, the elements for imposing the fine are stipulated in the Competition law, which is published on the website.

In Mexico, the Federal Law of Economic Competition sets out the elements that shall be considered when imposing the fine and no guidelines or explanations of the methodology underpinning the fine are available. In Switzerland, the penalty framework is comprised in the Federal Act on Cartels and Other Restraints on Competition (ACart). The ACart Ordinance on sanctions comprises the methodology and general criteria to consider in imposing fines and the Remarks on the ordinance on fines (set out by the competition authority) further expands on this methodology and criteria.

The other 12 jurisdictions in which the agency sets the fine and has made guidelines for the fine publicly available are: Bulgaria, the EU, Germany, Greece, Hungary, Italy, Korea, Malaysia, the Netherlands, Poland, Singapore and Spain.³⁴ In recent years the Guidelines have been published in Hungary (2012) and the Netherlands (2014). Zambia is in the process of drafting the guidelines.

In the EU, the European Commission first published guidelines on the determination of fines concerning anticompetitive conducts in 1998.³⁵ These guidelines were amended in 2006.³⁶ The rationale for the 1998 Guidelines, also mentioned in the 2006 Guidelines, is to ensure the transparency and impartiality of the European Commission's decisions.³⁷ This must be combined with the objective of achieving a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behavior that is contrary to Articles 101 and 102 TFEU (general deterrence).

The guidelines aim at limiting the European Commission's discretion, which otherwise would only be bound to take into consideration the gravity and the duration of the conduct, with the statutory maximum of 10% of the annual worldwide turnover of an undertaking. According to the case law of the European Court of Justice, "the Guidelines are an instrument intended to define, while complying with higher ranking law, the criteria which the Commission proposes to apply in the exercise of its discretion when

³³ Colombia, El Salvador, Japan, Mexico, Norway, Russia, Switzerland and Turkey.

³⁴ In Spain, the Supreme Court annulled the guidelines in its ruling dated of 29 January 2015.

³⁵ Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, Official Journal C 9, 14.01.98, page 3.

³⁶ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, Official Journal C 210, 1.9.2006, page 2.

³⁷ See paragraph 1 of the 1998 Fines Guidelines and paragraph 3 of the 2006 Fines Guidelines.

determining fines".³⁸ The European Commission is in fact obliged to take into account its own guidelines when determining fines.

Although the Hungarian Competition Act contains some principles about fine calculation, based on these there is a more detailed guideline (notice) elaborated and published by the competition agency concerning its fine-setting methodology.

To recap, as a whole, more than half of responding jurisdictions, namely 18 jurisdictions (6 jurisdictions where fines can be imposed by courts and 12 jurisdictions where the fine is set by the agency), have guidelines and make them public.

3.2.2 Transparency regarding individual cases

Concerning specific cartel cases, the questionnaire asked whether the actual reasoning that leads to the final amount of a fine is explained or published in their jurisdictions. The publication of the decision imposing pecuniary sanctions on the undertakings infringing substantive antitrust provisions contributes to deter any other potential offenders from the commitment of similar anti-competitive conduct.

In all but one of the jurisdictions which replied to the questionnaire, the reasoning underlying the fine is made public. In Ireland, the reasoning underlying the fine may not be published because the fine is determined by a court, and only the court may, at its discretion, order or permit that the transcript of the sentencing be made public.

In 32 jurisdictions where decisions imposing fines are always published, the amount of reasoning underlying the amount of the fine and the process for determining it varies. In 16 jurisdictions,³⁹ decisions including the methodology that leads to the final amount of the fine are also published.

In Korea, the fine calculation process is detailed in the final report of the Korea Fair Trade Commission which is available to the general public.

In Hungary, the reasoning underpinning the decision summarizes the most important circumstances and the methodology, which led to the final amount of the fine.

Also in Japan, the reasoning underpinning the amount of the fine is explained and published in decisions of the Japan Fair Trade Commission.

In the US, courts are required to state in open court at the time of the sentencing the reasons for imposing the particular sentence.

In Canada, court proceedings, including sentencing, are generally open to the public. Furthermore, Canadian judges are required to provide reasons for sentence, and enter those reasons into the record of the proceeding. Court records are generally available to the public.

³⁸ Court of First Instance, judgment of 15 March 2006, case T-26/02, Daiichi Pharmaceutical Co. Ltd ./ Commission of the European Communities, paragraph 49.

³⁹ Australia, Bulgaria, El Salvador, European Union, Greece, Hungary, Italy, Korea, Lithuania, Poland, Spain, Sweden, Switzerland, Turkey, the US and Zambia

In Turkey, the Competition Board decisions include explanations on how the existence of intent, the severity of fault, and the market power of the undertaking(s) upon which a penalty is imposed are all taken into account. These decisions also cite aggravating and mitigating factors.

In Italy, and in the EU, all decisions imposing fines contain some reasoning underpinning the calculation of the fine. In the EU, and in Italy, this is necessary because the appellate bodies have full jurisdiction to review the fines. In other words, the courts can accept or reject the motivation used by the agencies to justify all the elements included in the determination of the fine. In addition to the review by the Courts, the European Commission's decisions are also generally published in full (excluding confidential information) on DG Competition's website and a summary of the case, including a short explanation of the determination of the fines, is also published in the Official Journal of the European Communities.

4. BASIS FOR CALCULATION OF FINES

4.1 Fines imposed on undertakings

4.1.1 The concept of company turnover

The concept of ‘company turnover’ is referred to here mainly as a basis for the determination of the fine. It may also be used by many jurisdictions as a general factor to take into consideration to increase the fine in view of further deterrence or as a basis for capping the fine imposed to a maximum (the latter will be discussed under Chapter 7 on limits).

As regards fines imposed on companies, the obvious measure quoted by a number of agencies, with some exceptions, as a basis for the determination of the fine in cartel cases, is related to the concept of company turnover.⁴⁰ Familiar as it may sound, a company’s turnover is not a very clear concept and the interpretation of the term varies between jurisdictions. There are additional characteristics which can define this concept more narrowly, for example whether it refers to the product-related turnover of the perpetrator of the offence, or to the total turnover of this company in the jurisdiction at hand, or even to the worldwide consolidated turnover of the group to which the perpetrator of the offence belongs. Other related concepts used by agencies are the value of sales related to the infringement (the EU for example), or the volume of affected commerce (the US and Canada for example). Usually the starting point for determining the fine will be a percentage of this measurement. The underlying rationale behind the percentage chosen is typically that it is a proxy for the excess profits achieved by the cartelists.

4.1.2 Total turnover

A number of responding agencies quoted the total or global turnover of the undertakings concerned as (one of) the main criteria employed in order to determine the appropriate amount of fines in cartel cases.

However, there is no complete convergence as to the relevant notion of total turnover. In some cases, this will be the overall consolidated turnover realised by the offender and the group of companies to which it belongs worldwide in the relevant business year (the last year of the infringement or the year before the finding of the infringement).⁴¹ In Switzerland, while fines are primarily related to the turnover of the undertaking, an economic entity (a parent company and its subsidiaries) as a whole will be fined if the parent company controls its subsidiaries and they are considered a single economic entity. The economic entity will be fined based on the cumulative turnover of all of the included (legally independent) companies.

Several jurisdictions quantify the fines in cartel cases by taking a percentage of the total turnover of the offender between a minimum and a maximum, which is chosen in the light of the specific circumstances of the case⁴². For instance, in Brazil, the fine is determined as a percentage between 0.1% and 20% of the turnover within the country of the undertaking concerned, taking into account the gravity/seriousness of the infringement. In Bulgaria, a percentage varies depending on the gravity of the infringement; up

⁴⁰ The exceptions are the US and Canada, which rely on the volume of affected commerce as the basis for determining fines.

⁴¹ For example, the European Union, Finland, Italy, Malaysia and Norway replied that the notion of worldwide turnover is employed as a factor. See also chapter 7 on minimum and maximum fines.

⁴² Notably Brazil, Bulgaria and Estonia.

to 5 percent for minor infringements, up to 8 percent for not very grave infringements, and up to 10 percent for grave infringements.

In most jurisdictions, fines are not calculated as a percentage of total turnover. As will be further explained in Chapter 7, the total turnover can be used as an ex-post check of the adequacy or reasonableness of the final amount of the fine, since in these jurisdictions the statutory ceiling of the applicable fine is set as a percentage of the total turnover of the undertaking.⁴³

Global turnover can also be relevant for the more general purpose of deterrence (i.e. for increasing the fine) in addition to the determination of the basic fine. In fact, some agencies explicitly noted the possibility that the amount of the fine is increased to reflect particularly high global turnovers. For instance, the Fining Guidelines of the European Commission (2006) stipulate that “the Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates”.⁴⁴ In this case, it is worth noting that the global turnover taken into account by the European Commission is the worldwide total consolidated turnover of the group at large. This serves as a measure of comparison between the different undertakings in the cartel, but also for one and the same undertaking, as a measure of comparison between the importance of the cartelized product and the totality of this undertaking’s commercial activities. Guidelines on the setting of the fines applied by the German competition agency states that, “A fine which exceeds the gain and harm potential several times over can be appropriate for deterrent purposes. The larger the company is, the less sensitive it will be to punishment. Therefore, the limit above which the fine would no longer be appropriate will be higher, even in the worst possible constellation of a specific case”.⁴⁵

4.1.3 Relevant turnover

In several jurisdictions pecuniary sanctions in cartel cases relate directly to the value of sales on the relevant market concerned by the infringement. Reference to loosely-corresponding concepts such as relevant turnover, value of affected sales and/or value of affected commerce was made by 26 responding agencies.⁴⁶

In the EU, the basis for setting a fine is the value of sales of the goods or services to which the infringement relates. This is the turnover with all goods or services which are within the scope of the cartel, i.e. the products or services covered by the cartel and the geographic area within the EU or the EEA covered by the cartel. The combination of the value of sales to which the infringement relates and

⁴³ This is the case for Austria, the EU, El Salvador, Finland, Greece, Hungary, Ireland, Italy, Lithuania, Malaysia, Mexico, the Netherlands, Norway, Singapore, South Africa, Spain, Sweden, Turkey, and Zambia.

⁴⁴ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, Official Journal C 210, 1.9.2006, page 2, paragraph 30.

⁴⁵ Explanatory note on the guidelines for the setting of fines in cartel administrative offence proceeding of 25 June 2013, page 3.

⁴⁶ Notably 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.

of the duration of the infringement is thought to provide “an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement”.⁴⁷

A similar, albeit not identical, principle is found in the US where the volume of commerce of the perpetrator for the entire period of the infringement is taken into account to determine the base fine. The US Sentencing Guidelines⁴⁸ provide that 20% of the volume of commerce should be used to calculate the base fine amount. For this purpose, a company’s volume of commerce is the volume of commerce done by the company in goods or services that were affected by the violation.

Other agencies suggest that the relevant turnover can provide a rough indication of the potential gains deriving from the cartel. According to Article 2.3-5 of the 2014 fining policy rule applied by the Dutch authority, “[i]f ACM deduces from information at its disposal that the relevant turnover insufficiently reflects the actual economic value of the practice that is to be sanctioned, ACM may adjust the relevant turnover that is to be taken into account for said information.” The Canadian Competition Bureau clarified that “when making a sentencing recommendation to the Public Prosecution Service of Canada with respect to a cooperating party participating in its Leniency Program, 20 percent of an Applicant’s affected volume of commerce in Canada is the relevant starting point. The 20 percent figure includes two components: 10 percent of the affected volume of commerce in Canada as a proxy for the overcharge resulting from the cartel activity and other types of economic harm; and 10 percent of the affected volume of commerce in Canada for deterrence and to ensure that the fine is large enough that it does not represent a mere licensing fee or cost of doing business”.

Responses from most of the agencies show that the quantification of fines does not merely result from a mathematical approach based on the volume of affected sales and that the authorities are to consider various factors including the gravity/seriousness of the infringement.⁴⁹ It is indicative of the wide margin of discretion that competition authorities retain in order to properly determine the amount of fine. In Brazil, CADE’s decisions are discretionary acts, and it is bound to impose the penalties (cumulatively or not) in light of the principles of reasonableness as well as proportionality. Colombia states that the amount of fines imposed on legal entities follow criteria which includes the impact of the conduct in the market, the size of the relevant market, the benefit obtained by the offender’s conduct, the degree of participation involved, and so on. Finland points out that the amount of the penalty payment shall be based on an overall assessment, and in determining it, attention shall be paid to the nature and extent, the degree of gravity, and the duration of the infringement. The degree of gravity may be reflected in such factors as the nature of the participation of an undertaking or association of undertakings in the infringement, recidivism, actions that may have been taken in order to bring the infringement to an end, the harmfulness of the infringement, and proceeds from the infringement.

⁴⁷ European Commission’s guidelines on the method of setting fines, paragraph 6.

⁴⁸ The US Sentencing Guidelines set out a uniform sentencing policy for convicted defendants in the US federal court system. The guidelines are advisory but sentences outside the range established by the Guidelines are explained by the court that imposes the sentence.

⁴⁹ Including Australia, Austria, Brazil, Bulgaria, Canada, Colombia, Estonia, the EU, Finland, Germany, Greece, Hungary, Italy, Korea, Lithuania, Malaysia, the Netherlands, Norway, Poland, Singapore, Spain, Sweden, Turkey and the US.

4.2 Fines imposed on individuals

The majority of respondent jurisdictions may impose either administrative or criminal pecuniary sanctions on individuals involved in cartel activity.⁵⁰

In the US, the volume of affected commerce can not only influence the fine imposed on the individuals who participated in the cartel but also influence the basis for the jail terms that will be sought against these individuals. An adjustment based on the volume of commerce can be made to the base offence level indicated in the Sentencing Guidelines (the base level is 12 for antitrust offences, equating to a jail term of 10 to 16 months). The larger the volume of commerce of the company employing the individual, the larger the increase to the base offence level and therefore the longer the jail term provided under the Sentencing Guidelines.

However, most responding agencies provided very scant information on the criteria used to determine the amount of fines imposed on individuals, which makes it extremely difficult to identify possible common trends.

In general, a distinction may be drawn on the one hand between cases where pecuniary sanctions can be imposed on any natural persons involved in cartel activity, and on the other hand, those jurisdictions which target specific conduct of individuals. For instance, the Netherlands authority may impose fines on natural persons giving instructions or exercising de facto leadership with regard to antitrust infringements, including cartels. In Switzerland, pecuniary sanctions can be imposed on individuals if they control, beside the company relevant to the investigation, another company. The Brazilian agency can impose administrative fines on managers directly or indirectly responsible for a cartel where their company was involved, ranging from 1 percent to 20 percent of the fine imposed on the undertaking. Other individuals that do not perform business activity may be fined from BRL 50,000 to BRL 2 billion.

In addition, the treatment of individuals participating in cartel infringements may be distinguished with reference to the maximum level of fines. While in Canada, individuals involved in cartel activity face the same fines as undertakings, in the majority of cases pecuniary sanctions imposed on natural persons are determined differently, and several jurisdictions cap fines for individuals at a lower level in express terms.

4.3 Fines in cases related to trade associations

When the infringer is an association of undertakings, the turnover of the members of the association is the basis of calculation of fines in some jurisdictions.⁵¹ In the EU, “Where 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.”⁵²

⁵⁰ These include Australia, Brazil, Bulgaria,, Canada, Colombia, Estonia, Germany, Greece, Ireland, Israel, Japan, Korea, Lithuania, Mexico, the Netherlands, Norway, Poland, Russia, Singapore, Switzerland, Turkey, the US, and Zambia.

⁵¹ Specifically, Australia, the EU, Hungary, Japan, Malaysia, Norway and Spain.

⁵² European Commission’s guidelines on the method of setting fines, paragraph 14.

In other jurisdictions, the turnover of the association itself is the basis of the calculation.⁵³ In Italy, the turnover of the association is considered to be “the total amount of fees paid to the association by its members”. A number of jurisdictions in this category answered that they have an alternative basis or method of calculating fines in case the association does not have its own turnover. For instance, in Brazil, for trade associations which do not perform business activity, making it impossible to use the turnover criteria, the fine will be between BRL 50,000 to BRL 2,000,000,000. In Sweden, if the association has no relevant turnover, fines are calculated based on an "overall assessment".

Several jurisdictions have a hybrid system.⁵⁴ In the Netherlands, as a basis of calculation of fines, turnover of the members or the association itself is adopted, depending on the degree to which the members were directly involved in the infringement and on the degree to which their turnover is affected by the agreement of the association. It may also be relevant whether the association has income, separate from its members.

⁵³ Notably, Brazil, Bulgaria, Estonia, Finland, Germany, Lithuania, Poland, South Africa, Sweden and Zambia.

⁵⁴ Notably, Greece, the Netherlands, Singapore and Turkey.

5. DETERMINATION OF THE BASIC FINE

This chapter covers various methodologies on how to determine the basic fine, including the factors which contribute to the determination of the fine, how calculations are done and the relevance of the duration of the infringement. In addition, we will discuss some complicated questions related to cartels involving parts/interim products and indirect sales of products.

Most jurisdictions are acquainted with the concept of a basic amount, at least in respect of penalties which are applied to companies.⁵⁵ Having said that, however, the concept of a basic amount of fine is not common to all jurisdictions, and some jurisdictions do not have any particular fine-setting methodology (to be discussed later).

5.1 Factors

By and large, all responding authorities recognise that the amount of the fine depends on the gravity of the infringement. There seems to be consensus that hard-core cartels represent, by their very nature, the most serious forms of anti-competitive behaviours. More specific factors can however come into play (generally impinging on the determination of the gravity of the infringement). Many jurisdictions listed several factors to be considered.

For example, in Turkey, the market power of the undertakings is also taken into account in the determination of the fine.

Mexico takes into account the harm caused, the intention indicia, the market share of the offender, the size (value) of the affected market, the duration of the conduct, the economic capacity and the level of cooperation the offenders display during the investigation and the trial-like proceedings.

In Hungary, the characteristics of the market (e.g. whether it is contestable or not) as well of the characteristics of the product or the consumers (whether the product is essential for the consumer, whether some especially vulnerable consumer group is affected, whether there is a spill-over effect on other markets) are also taken into account.

When assessing the basic amount of the fine, the European Commission takes into account various factors such as the nature of the infringement, the combined market share of all undertakings concerned by the cartel, the geographic scope of the infringement and whether or not the infringement has been rigorously implemented.

5.2 How calculations work

It is observed that a majority of the authorities calculate the amount of fine as a certain percentage of the basis of the fine. As discussed in Chapter 4 in detail, there are several types of basis for calculation of the fine; for example, turnover/volume of affected commerce, value of sales of the products/services concerned and global/national turnover. As for the percentage, it depends on the gravity of the conduct

⁵⁵ This chapter will focus on the calculation of the basic amount of the fine which is applied to companies when they are held liable of a breach of substantive competition rules. Fines on individuals and procedural fines (whether periodic or not) are usually calculated according to different principles.

in many jurisdictions (Brazil, Bulgaria, the EU, Greece, Italy, Lithuania, the Netherlands, Poland and Sweden,).

In the EU, for example, the basic amount of the fine will be related to a proportion of the value of the cartelised sales, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement. The proportion of the value of sales taken into account can be set between 15 and 30%, depending on several factors (discussed above). Such amount will be multiplied for each undertaking by the number of years of its participation in the cartel. In addition, irrespective of duration, the basic amount in cartel cases will include an entry fee of between 15% and 25% of the value of the cartelised sales during the last year of the infringement. The latter amount aims at deterring undertakings from even entering into a hard-core cartel.

In Korea, the basic amount of the fine results from multiplying the cartel-related turnover by certain rates. Such rates are classified into five categories (0.5-3%, 3-5%, 5-7%, 7-8%, 8-10%) depending on the degree of gravity. The degree of gravity is quantified based on various factors (extent of restriction of competition, market share of participants, etc.). Each of these factors are given points, and the total amount of points indicates the degree of gravity. Whenever it is difficult to calculate the relevant turnover, a certain amount is decided as the basic fine, based on the degree of gravity.

Some jurisdictions do not consider the gravity of the offence in deciding the basis of fine.

In Japan, the sum of surcharges is calculated on the basis of the value of sales of affected products or services during the period of the cartel (3 years at a maximum). Sales values are multiplied by 10% in cartel cases to determine the amount of surcharge. This calculation rate varies depending on the type of business of the company. The size of the undertakings is also relevant. Indeed, if the amount of capital contribution or the number of regular employees is small, the calculation percentage is reduced.

5.3 In the absence of a basic amount

In some jurisdictions, the concept of the basic amount of a fine does not seem to exist; fines are determined on the basis of certain relevant factors, which may be considered in no specific order, or some of them may play a bigger role.

In El Salvador, the maximum amount of the fine is set as five thousand times of the monthly urban minimum wages in the industry-sector. However, when the offence committed is deemed as particularly grave, the competition authority may impose, instead of the before mentioned fine, a fine up to six percent of the annual sales obtained by the infringer, or up to six percent of the value of its assets during the preceding fiscal year, or a fine equivalent to at least twice and up to a maximum of ten times of the estimated profits resulting from the anti-competitive practices, whichever is higher.

Malaysia does not have the concept of a basic amount; instead, it considers several factors in determining the amount of the fine, within the limitation of 10% of global turnover multiplied by the number of infringements. A similar methodology applies in Australia and Ireland.

5.4 Duration

Duration can play a variety of roles in the calculation of the fine. Some authorities consider it to be relevant for the calculation of the fine, while others (Estonia, for example) do not.

10 authorities⁵⁶ deem that the duration is taken into account in the turnover or volume of affected commerce considered in the calculation of the basic amount. In the US, for example, the volume of affected commerce taken into account covers the entire duration of the infringement.

7 authorities⁵⁷ consider the duration as a mitigating or aggravating circumstance depending on the relative length of the infringement.

8 authorities⁵⁸ use the duration of the infringement as a multiplier when they calculate the sanction. They multiply the basic amount by a percentage or a coefficient. In the EU, for example, the basic amount is calculated on the basis of the last year of the infringement which is subsequently multiplied by the number of years of the infringement.

6 other authorities⁵⁹ also mention the duration as having importance in the calculation of the fine.

5.5 Indirect Sales and Transformed Products

A question may arise as to the concept of sales, when a cartel is formed with regard to captive products (products which are used by the company in the production of a downstream product) in such jurisdictions where the basis for the determination of fines is a proportion of the company's sales on the relevant market concerned; i.e, whether such sales should be limited to the direct sales of captive products or may include the sales of downstream product as well. We asked the following question; when the cartel members also transform the cartelised product and sell the transformed product (even not cartelised), is the value of cartelised product contained in the sales of transformed product taken into account?

Brazil, El Salvador (total sales of the company should be the basis of calculation), Lithuania (subject to the circumstances of the case) and Turkey (the competition authority decides whether to use direct or indirect turnover) replied that sales of the transformed products could be considered.

Many other jurisdictions⁶⁰ replied that only the direct sales of cartelized products should be the basis of the fine in all or most cases.

In this regard, the European Commission replied that, although the European Commission would take direct sales of the cartelized product into account, they would also take the value of the cartelized product in the sales of transformed product where there is no prior sale of the cartelized product outside of the undertaking.

⁵⁶ Canada, Greece, Hungary, Japan, Korea, Mexico (to estimate the caused harm), the Netherlands, Turkey, the US and Zambia.

⁵⁷ Austria, Canada, Germany, Finland, Israel, Russia and South Africa.

⁵⁸ Bulgaria, the European Union, Italy, Lithuania, Norway, Poland, Singapore and Sweden.

⁵⁹ Australia, Brazil, El Salvador, Ireland, Malaysia and Spain.

⁶⁰ Australia, Austria, Canada, the European Union, Japan, Korea, Malaysia, the Netherlands, Russia, Singapore, South Africa and Spain.

Similar situations can be seen when the transaction involves subsidiaries and affiliates of the company. We asked how fines would be calculated if a company A sells the cartelized product to another company B in the same group, which transforms and in turn sells it in the market.

Some jurisdictions replied that they do not have similar precedents, and others submitted various answers as follows. The European Commission and Mexico replied that the sales of company B may be taken into account for the determination of the fines imposed on A. Mexico further explained that under the “Interest Group” theory, if company B has ties with company A –either direct or indirect, which would entail them as acting towards the same economic goal– then, companies A and B could be deemed as one economic unit, and that the unit, as a whole, can cause the harm of the cartel, in which only A is involved, to final consumer.

On the other hand, Bulgaria, Japan, Singapore and Spain⁶¹ indicated that they would not consider the sales of company B for the determination of the fines imposed on A.

The US does not fall clearly into either of the above two categories. The US replied that if company B’s sales of the different product had a particular adverse effect on US commerce due to the price fixing, that effect might be taken into account in setting company A’s fine or be considered by the court as an aggravating factor.

5.6 Cartels in Parts and Interim Products

Further to the discussion in the previous section, the calculation of fines can be a complicated task when a cartel involved parts or other interim products, and in particular, when it involves international transactions. To analyze this problem, we asked the following hypothetical questions:

With regard to cartels formed by foreign companies, are fines imposed in your jurisdiction in the following cases? If yes, which amount of sales are used as the basis for calculating fines?

- a) In your jurisdiction, cartel participants sold the parts A for which the cartel was formed, then the parts A are assembled into end products B in your jurisdiction, and all or most of the products B are exported and sold in other jurisdictions.
- b) Cartel participants sold the parts A in other jurisdictions, then the parts A are assembled into end products B in the other jurisdictions, and the products B are imported and sold in your jurisdiction.

In answer to question a), Australia, Bulgaria, Canada, the EU, Germany, Hungary, Japan, Korea, Malaysia, the Netherlands, Spain and the US replied that their jurisdictions can impose fines based on the sales of product A. On the other hand, Mexico and Singapore replied negatively.

In answer to question b), EU, Mexico, the Netherlands and Singapore replied that they can impose fines. In addition, Finland replied that they would be likely to propose a penalty payment for the parts cartel in this scenario. The European Commission and the Netherlands explained that the sales of A, which

⁶¹ Spain noted that the sales of the end product by B are not taken into account for the determination of the fines imposed on company A, but that the basis of fine will include the group’s turnover and not just company A’s turnover.

are included in the sales of B, should be the basis of fine. Mexico explained that the quantification of the antitrust damage only requires at least one of the products is sold in Mexico.

The US replied that the competition authority has argued successfully for the inclusion in a company's volume of affected commerce that company's foreign sales of price-fixed components that were incorporated abroad into finished products that were sold in or for delivery to the US.

Australia, Bulgaria, Canada (subject to certain exceptions), Finland, Japan, Malaysia and Spain replied negatively.

6. AGGRAVATING AND MITIGATING ELEMENTS

In the previous chapter, we have already discussed the main factors which generally contribute to the determination of the basic amount of the fine, whether or not such a concept is actually used. In a similar fashion, this chapter will focus on factors which generally qualify to adjust the basic amount.

18 out of the 33 responding authorities have some kind of guidelines detailing the application of these fine-tuning aspects. In other systems, the governing principles are to be worked out on the basis of the decisional practice and the case law (see Ireland, where however there is an affirmative duty upon the prosecutor to make the court aware of factors that would aggravate or mitigate the imposition of the sentence).

6.1 Aggravating elements

6.1.1 Duration

On the possible attenuating or aggravating effect of long/short duration, see point 5.4 above.

6.1.2 Recidivism

Repeat offenders ("recidivists") are exposed to increased penalties in almost all jurisdictions, although practice differs between authorities and jurisdictions.

Limitations apply in some jurisdictions to the possibility of making a finding of recidivism. So, for example, in Japan, 10 years must not have elapsed before the second order. In the US, the prior similar misconduct must also have taken place within the last 10 years.

The EU has no such limitation. The Member States of the European Union are entitled and sometimes bound to apply both EU and national competition law, recidivism can be assessed taking into account previous infringements of EU competition law found by other EU competition authorities (including the European Commission).⁶² This is clearly the case in Greece. The Hungarian system considers recidivism even if another undertaking belonging to the same group commits the other infringement.

Turning to the kind of increase that recidivism commands, the most common approach is a percentage increase of the fine otherwise calculated, possibly through the application of some kind of multiplier (generally 2, or up to 2 – like in the case of Brazil, and Hungary). In Mexico, the Federal Economic Competition Commission can double the amount of a fine, and it may also order the divestiture of the involved economic agents' assets. In Japan, the law provides for the calculation of administrative fines to be increased by 50%.

6.1.3 Role of the undertaking in the infringement

⁶² Paragraph 28 of the 2006 fining guidelines of the European Commission allows fines to be increased by 100% in the case of recidivists.

28 out of the 33 responding authorities take ring-leadership as an aggravating factor. In Poland, the fine may be aggravated for the undertaking which has the role of the leader or initiator of the competition-restricting agreement or inducing other undertakings to participate in the agreement.

6.1.4 Refusal to cooperate – obstruction⁶³

The questionnaire asked how cooperation by the defendant is taken into consideration both in terms of aggravating and mitigating the amount of fine. Altogether 28 fine calculation methods consider these elements in one way or another.

Refusal to cooperate could lead to increases in the fine in 17 fine calculation systems. As an interesting solution, in the Netherlands, the ACM is allowed to impose a separate fine for refusal to cooperate up to 900 000 euro or 1% of the total annual turnover of the offender, whichever the bigger.

Obstruction leads to increases in the level of the fine in 18 fining regimes. In Italy the obstruction of the investigation may entail an increase up to 15%.

6.1.5 Size of undertakings

14 out of the 33 responding authorities consider the size of the undertakings as an aggravating factor. The Italian competition authority could increase the amount of the fine up to 50%, when the infringer had a particularly large total turnover in the world in relation to the value of sales of the services or products relating to the infringement or belongs to a corporate group of undertakings of great economic importance. The Swedish competition authority considers the turnover of the undertaking as an aggravating factor. Also the Swedish competition authority may increase the fine if the size of the undertaking necessitates adjusting the amount of fine in order to obtain the required deterring effect.

6.1.6 Ranking of the personnel involved

9 out of the 33 responding authorities take ranking of the personnel involved as an aggravating factor. In Malaysia, higher fines will be imposed if the infringement involves board members or senior management personnel.

6.1.7 Other factors

A wide variety of factors are mentioned in the “others” category:

- Some jurisdictions may increase the fine for “deterrence” of the conduct constituting the infringement.

⁶³ The General Framework Subgroup of the Cartel Working Group has already reviewed the issue of obstruction (see the report under: http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ObstructionPaper-with-cover.pdf)

- Some jurisdictions take the gravity of the infringement into account as an aggravating factor.
- Where a violating enterprise retaliates against other cartel members, the fine may be increased by the EU, Korean, and Swiss competition authorities.
- In Italy and Switzerland, illegal profits made from anticompetitive conduct are taken into account.
- Norway considers the financial position of the corporate group of which the undertaking is a part.

6.2 Mitigating elements

6.2.1 Effective cooperation

The most accepted mitigating factor is if the defendant shows willingness of cooperation. This is taken into consideration, in different forms, in 26 fining policies. In the US response, “reporting the offence to the government and cooperating in the investigation” are mentioned in the first and the second place as mitigating circumstances, “that can reduce the fine range for cooperation”. Likewise, “the court may reduce the imprisonment and fine ranges for an individual and fine ranges for corporations based on substantial assistance in the investigation or prosecution of others”.

6.2.2 Immediate termination of the infringement

Immediate termination of the infringing conduct can cause reduction of the fine in 18 jurisdictions. However, in Japan, to enjoy this kind of advantage the offender has to cease its illegal activity one month prior to the starting date of the investigation while the duration of the infringement must be less than 2 years. According to rules in Switzerland the termination should take place “after the first intervention of the COMCO (before the opening of an investigation)”. In the practice of the European Commission this factor may warrant a reduction of fine in some kinds of competition infringements but not in cartel cases.

6.2.3 Limited participation

Limited participation in the cartel, or playing a minor role in the offence is a mitigating circumstance in 21 jurisdictions. Turkey mentions “coercion by other undertakings” as a mitigating circumstance. In the US, a corporation’s role in the offence may be taken into account in determining the amount of the fine within the applicable Sentencing Guidelines range.

6.2.4 State action defence

10 out of the 33 responding authorities take into consideration the existence of a state action defence, e.g. improper state regulation, which can lower the final amount of the fine. In its response, Turkey refers to “existence of encouragement by public authorities”. The European Commission also

considers as a mitigating circumstance the fact the illegal conduct of an undertaking has been authorised or encouraged by public authorities or by legislation.⁶⁴

6.2.5 Negligence

6 authorities replied that negligence may be considered as a mitigating factor. However, some of them state or suggest that, in fact, it is not an effective mitigating aspect, since it is hard to imagine that an undertaking is not aware of the fact that its cartel behaviour is against the law. The European Commission's reply also mentions this possibility in some kind of competition infringements but not in cartel cases, even though it is listed as a possible mitigating factor in the fining guidelines.⁶⁵

6.2.6 A company's antitrust compliance program

9 out of the 33 responding authorities take a company's antitrust compliance program into consideration. In Singapore, when considering how much mitigating value to be accorded to the existence of any compliance program, the CCS will consider circumstances such as appropriate compliance policies and procedures in place, the support and observation by senior management, active implementation of the program and ongoing training for employees at all levels, and evaluation and review of the program at regular intervals.

6.2.7 Adjustment due to fines imposed for multinational cartel conduct by other competition authorities

Few competition authorities seem to adjust their fines when fines are imposed for multinational cartel conduct in other competition authorities. In Brazil, fines imposed by other competition authorities are taken into account. If the potential effects in Brazil are absorbed by other jurisdictions' sanctions, CADE may close, or choose not to open, a case. In Europe, where there is the possibility that National Competition Authorities may conduct separate procedures on the same facts and impose consecutive sanctions, they may have to take account of any previous fine decision from a Member State in determining any sanction which is to be imposed.⁶⁶

6.2.8 Size of the undertakings

8 out of the 33 responding authorities consider the size of the undertaking as a mitigating factor. Although the size of undertaking is considered as an aggravating factor as well, the number of competition authorities which consider it as a mitigating factor is small in comparison with those seeing it as an aggravating factor. In Japan, SMEs (defined on the basis of amount of capital or the number of the employees) may count on receiving lower fines.

⁶⁴ European Commission's guidelines on the method of setting fines, paragraph 29.

⁶⁵ European Commission's guidelines on the method of setting fines, paragraph 29.

⁶⁶ As an example, in the flour cartel which was notably pursued in Belgium, Germany and the Netherlands, the Brussels Court of Appeal annulled the fine of one of the participant for violation of the *ne bis in idem* principle. The Court of Appeal considered that the Belgian Competition Authority, when calculating the fine for the said participant (i) did not clarify whether this participant was sanctioned for consequences of the infringement in the Netherlands and for which the Dutch Competition Authority did not sanction him, and (ii) did not put the Court of Appeal in the position of determining if the fine only related to the practices in the Belgian territory.

6.2.9 Low profit rate

6 out of the 33 responding authorities consider low profit rate as a mitigating factor. The Austrian competition authority takes economic capacity into consideration.

6.2.10 Restitution to victims

11 out of the 33 responding authorities consider restitution to victims as a mitigating factor. Russia and Turkey consider voluntary compensation to those harmed.

6.2.11 Admission of infringement

In 12 out of the 33 jurisdictions the admission of the infringement is considered as a mitigating factor. The Bulgarian competition authority considers it as a mitigating factor in cases where an undertaking provides additional evidence for the infringement.

6.2.12 Other factors

The responses reveal several other mitigating circumstances.

Voluntary termination of the involvement before the start of the investigation is considered as a mitigating circumstances in Mexico and Sweden. In Switzerland and Greece, the non-performance of retaliation against other cartel members is seen as a mitigating circumstance, which can lead to a reduced basis of the fine. In Turkey, various factors have been used to mitigate the amount of fines (e.g. limited/no effect on the market, no public harm, not directly affecting the prices).

6.3 Mitigating elements versus leniency

All responding authorities have a leniency program.⁶⁷ Most of the authorities that answered the relevant question noted that leniency reductions apply to the amount of the fine which would otherwise have been applicable. This approach implies that leniency and other mitigating factors can be applied cumulatively.

6.4 Procedural fines

28 out of the 33 responding authorities indicate that they have a system to impose fines for procedural breaches. A number of responding authorities indicated that stand-alone procedural fines and the consideration of procedural breach as a factor that can aggravate the substantive fines are mutually

⁶⁷ The term “leniency program” includes “immunity program”.

independent and not mutually exclusive. Therefore, in some jurisdictions it is possible both to impose procedural fines and to increase substantive fines for obstruction of the investigation.⁶⁸

In the Netherlands, the ACM is allowed to impose a separate fine for refusal to cooperate up to €900,000 or 1% of the total annual turnover of the offender, whichever the higher. In the US, wilful obstruction or attempted obstruction of justice during the investigation may be considered as an aggravating factor and may lead to consideration of prosecution or sentencing the offence, as well as a separate criminal offence where appropriate. In Switzerland, the refusal to co-operate in the investigation or the obstruction of the investigation are observed within the calculation of the basis of the fine. In Korea, criminal fines are imposed on those who refuse, interfere with or evade an investigation through verbal abuse, assault, deliberated blocking or delay of entering the site, whereas administrative fines are imposed on those who refuse to appear at an interview by the investigator or present incomplete, false or incorrect information to official request.

6.5 Inability to pay – a further aspect to be considered

As a general remark, it should be highlighted that the provisions setting maximum fine levels at a certain percentage of the turnover are to be understood as a method of taking the ability to pay into consideration. This method is followed by several jurisdictions. As the Hungarian authority's reply underlines, the 10% turnover maximum was considered by the lawmakers as a guarantee that the set fine would not jeopardize the undertakings economic viability. In spite of this, the Hungarian fining system considers the economic difficulties of the undertakings and allows the payment of fine in instalments or even fine reduction.

Inability to pay is a circumstance to be considered in imposing the fine for most competition authorities. Only two (Bulgaria and Zambia) indicated that they have no possibility to take this factor into account.

In the case of authorities which may take into account the ability to pay, there are significant differences in how it is done. While some jurisdictions approach the question from a general legal point of view, applying the legal principle of proportionality, others take an economic approach by stating that the imposition of a fine cannot lead to the driving out of the market of the undertaking in question, thus causing an additional harm to competition (It is also possible that these two approaches are mixed in certain circumstances).

The Swiss 'Ordinance' explicitly mentions the general principle of proportionality. Upon request of the undertaking, the Swiss authority can examine the sustainability of the sanction for the undertaking. According to the agency, "[t]he goal is not to drive undertakings out of a market by imposing high sanctions." Following the principles of proportionality and rationality, the Lithuanian competition authority may reduce a fine where the imposition of the fine would irretrievably jeopardise the economic viability of that undertaking.

The other group of jurisdictions gives limited discretion to authorities, thus the firm's ability to pay influences the amount of the set fine only in exceptional cases. According to the US guidelines, the court

⁶⁸ In Lithuania, a procedural fine and the consideration of a procedural breach as an aggravating factor in the substantive fine are mutually exclusive; if the CC finds it does not constitute a separate infringement, it is treated as aggravating factors in a substantive investigation. If the CC finds it might be regarded as a separate breach of the law, the CC would open a separate procedural investigation.

may reduce the fine to the extent that imposition of the fine would otherwise impair the corporation's ability to make restitution to victims. The courts may also impose lower fines if the corporation is not able and, even with the use of a reasonable instalment schedule, is not likely to become able to pay the prescribed fine. In any event, any such reduction should not be more than necessary to avoid substantially jeopardizing the continued viability of the organization.

In the EU, the European Commission may in exceptional cases, on request of the party, take account of the undertaking's inability to pay in a specific social and economic context. This means that a reduction could be granted solely on the basis of objective evidence that the imposition of the full fine would irretrievably jeopardize the economic viability of the undertaking concerned and cause its assets to lose all their value as well as have severe consequences on the undertaking's social environment.⁶⁹

In Germany, the ability of an undertaking to pay the fine is taken into consideration in the process of determining the amount of the individual fine. The Bundeskartellamt can take the company's economic viability into account. The Bundeskartellamt is not authorized to skim off the profit obtained in the course of unlawful cartel conduct, if the recovery of the profits would threaten the existence of the company. The inability of an undertaking to pay the fine can also be taken into account by granting the company accommodations for payment. The Hungarian authority has the right to allow instalment payments upon the request of parties.

In Italy, when an undertaking proves its inability to pay the AGCM can reduce the amount of the fine accordingly. To benefit of this reduction, an undertaking must present to the Authority objective evidence that due to the undertaking's financial capability the payment of the sanction could entail its exit from the market⁷⁰.

In South Africa, the inability of the firm to pay a fine is taken into account when determining a fine. The firm has to provide the Commission with financial statements, and once a determination is made that the firm is indeed unable to pay any administrative penalty, the Commission may reach a no-penalty settlement by approval of the Tribunal

In Canada, in the case of a party cooperating through the Leniency Program, claims must be supported by strong evidence before any reduction in fine or adjustment to payment schedule will be recommended by the Competition Bureau to the Public Prosecution Service of Canada. An undertaking will be required to provide financial information about its assets, liabilities, revenues and equity. The Bureau may also request an independent third-party expert accountant review the undertaking's financial information at the expense of the applicant. The ability of the offender to pay is also a factor that the Criminal Code requires the courts to consider when sentencing an undertaking.

In Korea, the KFTC considers the company's financial condition and if it is not able to cover the fines, these can be mitigated. In case of a company with impaired capital, the penalty surcharge can be reduced within 50%. However, when the company's impaired capital exceeds 50% of the total assets, the surcharge can be reduced by more than 50%.

⁶⁹ European Commission's guidelines on the method of setting fines, paragraph 35.

⁷⁰ Pursuant to paragraph 31 of the Guidelines issued by the AGCM on the method of setting fines for infringements of competition rules.

The replies of Australia, Brazil, Finland, Ireland, Israel, Spain and Turkey indicate that the ability to pay may be taken into consideration, without further specifying the exact circumstances under which this criterion could be applied and the method of application.

6.6 Application of aggravating/mitigating factors

23 out of the 33 responding authorities indicated that there are cases in which fines were actually increased because of aggravating factors. For example, Japan took into account aggravating factors in 36 cases in the last 10 years, Mexico took in 25 cases, and Greece took in 4 cases. The role played by the company in the offence is one of the most common aggravating factors. For example, in a case against 14 flour producers, the Netherlands increased the fines on Meneba and Werhahn by 50% and 20%, respectively.

23 out of the 33 authorities responding indicated that there are cases in which fines were actually decreased because of mitigating factors. For example, the European Commission took mitigating factors into account in 24 cases in the last 10 years, Greece in 16 cases, and Italy in 14 cases. A lot of authorities decreased fines because of effective cooperation. Italy reduced fines by 10% for this reason in 2015 (I780), the Netherlands also reduced 10% in two cases, and Spain reduced fines by 5% in the case S/0120/08 Transitarios.

Several factors can be concurrently applied. For example, Bulgaria reduced the fine in Decision 496/2010 because of partial termination of the infringement, effective cooperation, and the measure to limit the negative effects of the infringement. Lithuania reduced the fines in a cartel case of cinema operators because of the assistance to the competition authority in the course of the investigation and the voluntary termination of the illegal actions.

Chart D: Aggravating factors

This chart shows the aggravating factors which are specifically taken into account in competition laws, guidelines, precedents etc., according to the responses. Other aggravating factors may be taken into account even though these are not shown in this chart.

| | |
|-----------------------------------|--|
| Duration ⁷¹ | AU, AT, CO, FI, DE, HU, IE, IL, KR, RU, ZA |
| Recidivism | AU, AT, BR, BG, CA, CO, EU, FI, DE, GR, HU, IL, IT, JP, KR, LT, MY, MX, NL, NO, PL, RU, SG, ZA, ES, SE, CH, TR, US |
| Role in offence | AU, AT, BR, BG, CA, CO, EU, FI, DE, GR, HU, IE, IL, IT, JP, LT, MY, MX, NL, NO, PL, RU, SG, ES, SE, CH, TR, US |
| Refusal of cooperation | AU, BR, BG, EU, FI, GR, HU, IE, IL, LT, MY, MX, NL, SG, ZA, ES, TR |
| Obstruction | BR, BG, CO, EU, FI, GR, HU, IL, IT, MY, MX, NL, SG, ZA, ES, CH, TR, US |
| Size of undertaking | AU, AT, BR, CA, FI, HU, IL, IT, LT, MX, SG, ES, SE, US |
| Ranking of the personnel involved | AU, BR, CA, FI, IL, MY, NL, SG, US |

⁷¹ Only if duration is not considered in the basic amount of the fine. Please see point 5.4 for more detail.

Chart E: Mitigating factors

This chart shows the mitigating factors which are specifically taken into account in competition laws, guidelines, precedents etc., according to the responses. Other mitigating factors may be taken into account even though these are not shown in this chart,

| | |
|---|--|
| Negligence | AT, BR, EU, GR, MX, SE |
| Immediate termination | AT, BR, BG, CA, EU, DE, GR, HU, IT, JP, LT, MX, PL, SG, ZA, ES, SE, CH |
| Short duration | AT, BR, CA, DE, MX, SG, ZA |
| State action defence | BR, CA, EU, HU, IT, LT, NL, NO, SE, TR |
| Effective cooperation | AU, AT, BR, BG, CA, CO, SV, EU, DE, GR, HU, IE, IT, KR, LT, MY, MX, NL, NO, PL, RU, SG, ZA, ES, TR, US |
| Limited participation | AT, BR, BG, CA, CO, EU, DE, GR, IE, IT, LT, MY, MX, NO, PL, RU, SG, ZA, SE, CH, TR |
| Antitrust compliance program | AU, BR, CA, DE, IT, MY, MX, SG, US |
| Imposed fine by other Competition Authorities | BR, CA, DE |
| Size of undertakings | AU, AT, BR, CA, GR, JP, LT, TR |
| Low profit rate | AT, BR, CA, DE, MX, ZA |
| Restitution to victims | AU, BR, CA, DE, HU, KR, MY, NL, PL, RU, SE |
| Admission of infringement | AU, AT, BR, BG, CA ⁷² , DE, HU, LT, NL, SG, ZA, US |

⁷² Credit for admission of the infringement is built into the general discount applied for participation in the Leniency Program.

7. LIMITS (MAXIMA AND MINIMA)

7.1 Legal limits of the fine, maxima/minima of the fine imposed

7.1.1 Maximum limits

a) Fines for involvement in a cartel

The legislative frameworks of all the responding competition authorities provide for a maximum amount of fines that can be imposed on undertakings, and half of responding competition agencies also have a fining policy allowing the fining of individuals.

Fines against undertakings

The maximum amount of the fine imposed on undertakings may be defined in two principal ways.

First, it may exclusively be a specific monetary amount (Canada: Can\$25 million; Japan: 500 million yen for a criminal fine).

Secondly, it may be set as a percentage of turnover or similar measure: Norway, the European Union and a significant number of EU member states such as Austria, Finland, Greece, Hungary, Italy and Spain: 10% of the firm's worldwide turnover during the last financial year⁷³; Brazil: 20% of the turnover of the last financial year; Mexico: 10% of the firm's annual turnover for the last financial year⁷⁴; Switzerland: 10% of the turnover achieved by the enterprise in Switzerland in the last three business years; and Turkey: up to 10% of the annual gross revenue of undertakings and associations of undertakings or members of such associations generated by the end of the financial year preceding the final decision (or if that cannot be calculated, annual gross revenue generated by the end of the financial year that is the closest to the date of the final decision).

When referring to turnover, some of the considered jurisdictions use the total turnover of the incriminated company, and generally its worldwide turnover, whether gross or net (except Switzerland and Brazil a.o., which only use the turnover achieved in the jurisdiction)⁷⁵.

When turnover is the criteria, most competition authorities only consider the last fiscal year or accounting period, or calculate an average turnover for a certain period. Switzerland uses the turnover achieved in the last 3 business years and France considers the highest worldwide turnover achieved in one of the financial years in which the practices were implemented.

Several jurisdictions choose to refer to the value of cartelised sales in the market concerned. Russia uses 1/100 to 15/100 of the value of sales/volume of commerce on the relevant market concerned by the

⁷³ In Europe, the Court of Justice of the European Union specifies in a recent judgment that for the purpose of calculating the 10% ceiling, if an entity was subsequently acquired by another entity after the infringement period, it is the acquired entity's own turnover that must be considered (see Case C-637/13P, *Laufen Austria AG v European Commission*, ECLI:EU:C:2017:51).

⁷⁴ Excluding any income obtained from sources located abroad.

⁷⁵ On the notion of global/relevant turnover and consequences, see points 3.1 and 4.1 above.

infringement. The US uses the volume of US commerce affected by the defendant's participation in a cartel for the period during which the cartel operated when calculating that defendant's fine range under the U.S. Sentencing Guidelines.

In some jurisdictions, the statutory limits of the fine may be a combination of two or more of the above described concepts. For example, in Germany, the combination is €1 million or 10% of the undertaking's worldwide turnover, depending on the type of infringement. In Korea surcharges will be up to 10% of the relevant turnover or 2000 million won if the turnover cannot be used.

Where alternative systems exist, the greater amount generally applies; in Ireland the greater of €4 million or 10% of turnover in the year prior to the imposition of the sentence, in the Netherlands €900 000, or, if higher, 10% of annual turnover over the years during which the violation took place, with a maximum of 4 years. A third criterion comes into play in some jurisdictions. In the US, the alternatives are \$100,000,000, twice the gross pecuniary gain or twice the gross pecuniary loss caused to the victims of the crime by the conspirator, whichever is greater.

Fines against individuals

Some responding jurisdictions only apply fines to undertakings. This is the case for Austria, El Salvador, the European Union, Finland, Hungary, Italy, Malaysia, South Africa and Sweden.

Where fines can be imposed on individuals, the amount of the pecuniary sanction can vary between 1 and 20% of the fine imposed on the undertaking (Brazil) or it can be the same maximum amount as the one applying to the undertakings (Canada: Can\$25 million; Ireland: €4 million). The maximum level of fine imposed on individuals may also be a specific monetary amount (Germany: €1 million; Korea: 200 million won).

In Japan, the law determines the maximum amount of fine imposed on individuals only when this fine has a criminal nature (5 million yen).

In the US, as is the case for undertakings, alternatives apply to fines imposed on individuals: \$1,000,000 per violation, or twice the gross pecuniary gain, or twice the gross pecuniary loss to the victims, whichever is greater.

b) Procedural fines

In most of the responding jurisdictions legal limits are quite commonly provided in case of non-compliance with procedural obligations.

Some of them are criminal (Canada, Finland, Greece, Ireland, Israel, Japan, Korea, Russia, Switzerland) but the vast majority are administrative sanctions. All the responding jurisdictions imposing sanctions for procedural breaches only provide for a maximum level of sanctions (amount of fines and/or years of imprisonment).

The most common types of procedural fines include:

■ incomplete, false or incorrect information and delays in replying to official requests: this is the case in Brazil where a maximum daily fine of BRL 5.000 may be imposed and can be increased up to 20 times; in Norway, the maximum fine is 1% of the undertaking's worldwide turnover; in Turkey, the Competition Board may impose a fine equal to one thousandth of the annual gross revenue of the undertaking or association of undertakings or the members of such association;

■ impediment, prevention or obstruction of proceedings (such as inquiry or examination), and failure to comply with an order or a warrant: in Brazil, any hindrance to inspections may subject the inspected party to a fine of BRL 20,000 to BRL 400,000, depending on the economic status of the offender; in Canada: on summary conviction, the fine may be up to \$100,000 and/or the imprisonment shall not exceed 2 years whereas on conviction on indictment, the fine is in the discretion of the court and/or the imprisonment shall not exceed 10 years; in Ireland, this leads to criminal fines up to €3,000 and to a maximum of 6 months imprisonment; in the US, a corporation's fine range for a cartel offence may be increased if the organization wilfully obstructed or attempted to obstruct the government's investigation, or a corporation or individual can be charged criminally with a separate obstruction offence, where appropriate, and maximum corporate fine of \$500,000 can be imposed and individuals can be fined up to \$250,000 and sentenced to up to 5 years in prison;

■ destruction, alteration of any record or other thing that is required to be produced, and seals broken on business premises set up in connection with dawn raids: in Canada, on summary conviction, the fine may be up to Can\$100,000 and/or the imprisonment shall not exceed 2 years whereas on conviction on indictment, the fine is in the discretion of the court and/or the imprisonment shall not exceed 10 years; in Norway, the maximum fine is 1% of the undertaking's worldwide turnover; in the US, corporations can be fined up to \$500,000 and individuals may be fined up to \$250,000 and sentenced to up to 20 years imprisonment under certain circumstances;

■ failure to appear at a hearing, refusal to testify: in Ireland, such procedural breaches lead to criminal sanctions of fines up to €3,000 and up to 6 months imprisonment; in the US the individual or corporation may be charged with contempt;

■ disobedience and failure to fulfil the measures imposed: in Brazil, the maximum fine for disobedience is a daily fine of R\$ 5,000 which may be increased up to twentyfold according to the financial status of the offender and the severity of the infringement.

In the EU, procedural fines (for example providing incorrect or misleading information, breaching seals⁷⁶) can amount to 1% of the total turnover of the undertaking in the preceding business year. In addition, periodic penalty payments of up to 5% of the average daily turnover in the preceding business year can also be imposed on a daily basis when undertakings fail to comply with a European Commission decision (for example a decision compelling an undertaking to end an infringement, to supply information). Hungary applies a similar approach with fines up to 1% of yearly turnover on procedural breaches and 1% of daily turnover as periodic penalty payments.

7.1.2 Minimum limits

⁷⁶ In 2008 the European Commission imposed a fine of €38 million on E.On for deliberately tampering with a Commission seal affixed to an office door in E.On's premises during a Commission dawn raid in 2006. The fine was upheld by the EU courts.

In most cases, there are no minimum limits.

The minimum limit is provided as a fixed amount in some jurisdictions. Germany has set a fixed minimum of 5 euros. In Turkey procedural fines, for instance, regarding provision of incorrect, misleading information or documents can be imposed equalling one thousandth of the annual gross revenue provided that the amount is no less than 10000 Turkish liras. In Hungary, the minimum amount of a procedural fine is 200,000 Hungarian forint.

Only 5 out of the 33 responding competition agencies have both minimum and maximum statutory limits; i.e., Brazil, Germany, Greece, Japan and Russia.

7.2 Legal limits for other types of sanctions

In addition to fines, in some jurisdictions individuals may be subject to other types of sanctions. Such sanctions fall into two different categories.

On the one hand, jurisdictions like Australia, Austria, Brazil, Canada, Colombia, Estonia, Germany (for bid rigging only)⁷⁷, Greece, Hungary, Ireland, Israel, Japan, Korea, Mexico, Poland, Russia, South Africa, the US, and Zambia have a jail sentencing regime.

Chart F: Maximum Time of Imprisonment⁷⁸

| 3 years | 5 years | 7 years | 10 years | 12 years | 14 years |
|----------------|--------------------------------------|---------|-------------------|----------|----------|
| AT, EE, KR, PL | BR, DE, GR, HU, IE, IL, JP, ZM | RU | AU, MX, ZA, US | CO | CA |

On the other hand, some jurisdictions have a disqualification system whereby individuals who have been found guilty of participating in a cartel may be temporarily excluded from management. This is the case in Australia, Brazil, Ireland, Israel, Lithuania, Mexico, Russia and Sweden. The maximum term of disqualifications is 5 years in Israel, Lithuania, Mexico, and 3 years in Russia. In Mexico, the Federal Economic Competition Commission may issue orders of disqualifications, which means that any individual who directly or indirectly has participated in cartel agreements on behalf or on account and order of undertakings will not be able to act as an undertaking's board member, manager, director, executive, agent, representative or legal representative for a maximum of 5 years. In Australia it is for the court to determine the appropriate period of disqualification.

In addition, in Brazil, Colombia, El Salvador, Finland, Germany, Greece, Hungary, Japan, Korea, Mexico, Norway, Poland, Spain, Sweden and the US, the public contracting authorities can exclude cartel participants from bidding/public tender in public procurement.

⁷⁷ With regard to individuals, the competent authority for bid rigging cases is not the Bundeskartellamt but the public prosecutor.

⁷⁸ See Appendix 1 for the names of jurisdictions abbreviated in this chart.

Brazil provides for a wider range of other sanctions in case of cartels. These sanctions include (i) the publication of the decision in a major newspaper at the offenders' expense, (ii) ineligibility for participation in public procurement procedures and obtaining funding from public banks, (iii) registration of the offenders' names (companies, managers and individuals) in the National Registry for the Consumer Protection, (iv) recommendation that the proper public agencies (a) grant compulsory licenses for patents held by the participants, and (b) deny the cartel participant the possibility of paying federal overdue debts in instalments or order the total or partial cancellation of tax incentives or public subsidies, or (v) the company's divestiture, transfer of corporate control, sale of assets, partial interruption of activities, (vi) the prohibition on the offenders from carrying on businesses on their behalf or as representatives of a legal entity for up to 5 years, or any other measure required to cease harmful effects on competition.

Hungary has a special type of fines for the effective enforcement of the decisions of the competition authority. This type of fine can be imposed if the party obliged by the decision of the authority to perform an act or display a conduct fails to act accordingly. The enforcement fine cannot exceed HUF 50 thousand (€200) per day. In the case of failing to comply with the requirements until an extended time limit, the amount of the fine may be doubled.

7.3 Highest cartel fines ever imposed on a single company and a single case

The EU and US economic blocks have imposed comparatively high fines on a single company and in a single case: The European Commission imposed its largest fines of €2,926,000,000 on five truck producers including Daimler, on which it imposed the largest fine of €1,009,000,000 (2016). The USA's largest fines in a single investigation is \$2,900,000,000 on auto parts producers (as of 2017), and the largest fine on a single company is \$925,000,000, which was paid by Citicorp as a result of the foreign currency exchange investigation (2017).

In Europe, Switzerland and Germany have imposed similar maximum fines (approximately €200,000,000 for Switzerland and €251,500,000 for Germany), and the other jurisdictions have issued fines between €1,276,000 and €152,000,000. In these jurisdictions the maximum amount of fine in a single case is between approximately €27,135 and €700,800,000.

In Latin America, Brazil's maximum fine ever imposed on a single company amounted to approximately US\$ 520,000,000 (2014). Brazil's maximum fine in a single case was US\$ 1,050,000,000 (2014). Mexico has fined a maximum of 89,970,000 pesos on a single company (2014) and 419,081,739 pesos (2009). Colombia's biggest is approximately US\$ 45.4 million on a single company (2013) and US\$ 82.6 million in a single case (2015). El Salvador's highest fine is approximately US\$ 2,061,406 on a single company (2008) and US\$ 4,032,421 in a single case (2008).

In Africa, South Africa's maximum fine ever imposed amounted to approximately 1.5 billion rand (2016) on a single company and 1.46 billion rand in a single case (2013 in construction sector). Zambia has fined approximately US\$ 16,665 (2013).

In the Asia-Pacific zone, Australia's largest amount of fines on a single company is AUD 36 million and in a single case is AUD 98.5 million. Canada's maximum fines on a single entity is \$48 million and in a single case is approximately \$96 million (between 1999 and 2002). Japan imposed its maximum surcharge of 13 billion yen (2014) (approximately US\$ 121,310,000) on a single company and 27 billion

yen (2010 in bid-rigging on constructions for garbage-disposal facilities). Korea imposed its largest fines of 669 billion won on six LPG suppliers including SK Gas, on which it imposed the largest fines of 199 billion won (2009). Malaysia's largest fines on a single company and in a single case are approximately US\$2.44 million and US\$4.87 million, respectively. Singapore's maximum fine on a single company is SGD\$4,773,423 and in a single case SGD\$7,180,852 (2014).

Israel's largest fines on a single company is approximately US\$3,300,333 (2005) and in a single case is approximately US\$5,500,000 (2005). Russia imposed its largest fines on a single company about US\$6,438,870 and in a single case about US\$12,967,741 (2008-2009). The maximum fine imposed by Turkey on a single company is around €137 million (2014) and in a single case is around €376 million (2013 in Banking case).

| | MINIMUM | MAXIMUM | HIGHEST FINE EVER IMPOSED ON A SINGLE CASE / COMPANY |
|-----------|--|---|---|
| AUSTRALIA | no | <p><u>Criminal or civil sanctions:</u> For corporations: the greater of - AUD 10 million; - three times the total value of the benefits obtained and reasonably attributable to the conduct; or - 10 per cent of the annual turnover of the corporation during the 12 month period ending at the end of the month in which the conduct occurred</p> <p>For individuals: -AUD 500,000 (civil pecuniary penalty) -AUD 360,000 (criminal fine)</p> | <p><single company> \$36 million</p> <hr/> <p><single case> \$98.5 million</p> |
| AUSTRIA | no | <p><u>Administrative sanctions:</u> 10% of the total turnover of the undertaking in the preceding business year</p> | <p><single company> €40.21 million in food retail market cartel cases</p> <hr/> <p><single case> €30 million in a food retail market cartel case</p> |
| BRAZIL | <p><u>Administrative sanctions:</u> For undertakings: 0.1% of the total turnover in the preceding fiscal year</p> <p>For responsible individuals: 1% of the corporate fine</p> <p>For other individuals or public and private entities that do not perform business activity: BRL 50,000</p> | <p><u>Administrative sanctions:</u> For undertakings: 20% of the total turnover in the preceding fiscal year within CA</p> <p>For responsible individuals: 20 per cent of the corporate fine.</p> <p>For other individuals or public and private entities that do not perform business activity: BRL 2 billion</p> | <p><single company> BRL 1,565,646,977.20 (approximately \$520,000,000)</p> <hr/> <p><single case> BRL3,151,941,615.57 (approximately \$1,050,000,000), in the cement cartel</p> |
| BULGARIA | no | <p><u>Administrative sanctions:</u> up to 10% of the turnover for the preceding financial year of the undertaking.</p> | <p><single company> BGN 2,818,000</p> <hr/> <p><single case> BGN 2,914,560</p> |
| CANADA | no | <p><u>Criminal sanctions:</u> For undertakings: \$25 million; 10 year prohibition order</p> | <p><single company> \$48,000,000, in the bulk vitamin matter (1999)</p> |

| | | | |
|---------------------|----|--|---|
| | | For Individuals: \$25 million; 10 year prohibition order; 14 years imprisonment | <single case> \$95,595,000, in the bulk vitamin matter |
| COLOMBIA | no | <u>Administrative sanctions:</u> Legal entities: 100,000 statutory monthly minimum wages (approximately \$ 25,000,000) or up to 150% of the gross profit of the conduct if such amount is higher. Individuals: 2,000 statutory monthly minimum wages (approximately \$ 470,000) | <single company> Comcel S.A.: 87,750 million pesos (\$45,4 million USD), for the abuse of a dominant position in the mobile voice market (2013). |
| | | | <single case> |
| EL SALVADOR | no | <u>Administrative sanctions:</u> 5000 times of monthly urban minimum wages in the industrial sector. When CA deem infringement as grave, the highest of -6% of the annual sales obtained by the infringer or -6% of the value of its asset during the preceding fiscal year or -10 times of the estimated profits resulting from the infringement | <single company> HARISA, S.A. de C.V.: \$2,061,406.20 (2008) |
| | | | <single case> \$4,032,421.326(2008) |
| ESTONIA | no | <u>Criminal sanctions:</u> Legal person: 10% of the turnover of the legal person, or €16,000,000 Natural person: Maximum pecuniary punishment is based on the valid daily rate and the daily rate of a pecuniary punishment is the basis of the average daily income of the offender. The daily rate which is applied shall not be less than the minimum daily rate. The minimum daily rate shall be 10 euros. | <single company> Company: Aktiaselts Liviko :€ 1,276,000 (2015) Natural person: €27,135 (2015) |
| | | | <single case> |
| EUROPEAN COMMISSION | no | <u>Administrative sanctions :</u> 10% of the total worldwide turnover of the undertaking in the preceding business year | <single company> Daimler(truck producer): €1,009,000,000 |
| | | | <single case> €2,926,000,000 |
| FINLAND | no | <u>Administrative sanctions :</u> 10% of the total worldwide turnover of the undertaking or association of the undertakings in the last year it took part | <single company> €68,000,000, in the so-called asphalt case |

| | | | |
|----------------|---|--|--|
| | | in the infringement | <single case> €82,500,000, in the so-called asphalt case |
| GERMANY | Individual and undertakings: €5 | <u>Administrative sanctions</u> For undertakings: €1 million or 10% of the total turnover of the preceding business year For individuals: €1 million | <single company> €251,500,000, in the cement cartel |
| | | | <single case> €700,800,000, in the cement cartel |
| GREECE | <u>Administrative sanctions:</u> <u>For individuals:</u> €200,000 <u>Criminal sanctions:</u> - €15,000 - imprisonment of 2 years | <u>Administrative sanctions:</u> For undertakings: 10% of the total turnover of the undertaking for the financial year For individuals: €2,000,000 <u>Criminal sanctions:</u> - €1,000,000 - imprisonment of 5 years | <single company> BP HELLAS S.A.: €30,066,585 (2008) |
| | | | <single case> €49,731,473 (2008) |
| HUNGARY | no | <u>Administrative sanctions:</u> 10% of the undertaking's net revenue of the preceding financial year | <single company> HUF 4.97 billion (approximately €16.04 million) |
| | | | <single case> HUF 9.5 billion (approximately €31.6 million) |
| IRELAND | no | <u>Criminal sanctions:</u> For undertakings: - €5,000,000 or - 10% of turnover, whichever is greater For individuals: 10 years of imprisonment | <single company> €80,000 |
| | | | <single case> |
| ISRAEL | no | <u>Civil sanctions:</u> Individuals: NIS 1,023,520 (approximately \$272,140) Undertakings: NIS 24,564,360 (approximately \$6,531,337) <u>Criminal sanctions:</u> Individuals: NIS 2,260,000 (approximately \$600,000) Undertakings: NIS 4,520,000 (approximately \$1,150,000) | <single company> NIS 12,000,000 (approximately \$3,300,000) |
| | | | <single case> NIS 20,400,000 (approximately \$5,500,000) |
| ITALY | no | <u>Administrative sanctions:</u> 10% of the undertaking's worldwide turnover in the preceding business year | <single company> Telecom Italia S.p.A.: €152,000,000 |

| | | | |
|-------------|---|--|--|
| | | | <single case> €301,030,000 |
| JAPAN | <u>Administrative sanctions(surcharges):</u> 1 million yen <u>Criminal sanctions(fines):</u> For individuals and undertakings: 10,000 yen | <u>Administrative sanctions(surcharges):</u> 10% of the sales amount of the relevant goods or services <u>Criminal sanctions:</u> For undertakings: 500 million yen For individuals: 5 million yen imprisonment of 5 years | <single company> Nippon Yusen Kabushiki Kaisha: approximately 13 billion yen (2014) |
| | | | <single case> 27 billion yen, in the bid-rigging on construction ordered by local government for garbage-disposal facilities (2010) |
| KOREA | no | <u>Administrative sanctions (surcharges):</u> 10% of the related turnover Or 2000 million won when it is impossible to calculate the related turnover <u>Criminal sanctions:</u> 200 million won | <single company> SK Gas: 199 billion won (2009, surcharge) |
| | | | <single case> 666 billion won (2009) |
| LITHUANIA | no | <u>Administrative sanctions:</u> 10% of the gross annual income in the preceding business year | <single company> UAB: €19,004,000 |
| | | | <single case> €35,600,000 |
| MALAYSIA | no | <u>Civil sanctions:</u> 10% of the worldwide turnover of the enterprise over the period during the infringement | <single company> RM 10 million (approximately \$2.44 million) |
| | | | <single case> RM 20 million (approximately \$4.87 million) |
| MEXICO | no | <u>Administrative sanctions:</u> For undertakings:10% of the economic agent's annual income | <single company> S.A. de C.V. : 73,005,000 Mexican pesos |
| | | | <single case> 419,081,739 Mexican pesos |
| NETHERLANDS | no | <u>Administrative sanctions:</u> €450,000 (€900,000 under the new legislation) Or if it is greater: 10% of the annual turnover. That figure is multiplied by the number of years the offence has lasted, with a maximum of 4 years. The maximum fine is doubled for repeat offenders. | <single case> €200 million, in the Construction fraud case |
| | | | <single company> €22.8 million, in the flour producers case |

| | | | |
|--------------|---|---|--|
| NORWAY | no | <u>Administrative sanctions:</u> 10% of the worldwide turnover of the undertakings | <single company> NCC AB and NCC Roads AS: NOK 150 million (approximately €18 million) in the asphalt case |
| | | | <single case> . |
| POLAND | no | <u>Administrative sanctions:</u> 10% of the turnover generated in the last financial year | <single company> |
| | | | <single case> PLN 411,586,477 (approximately €101,126,899), in the cement cartel (2009) |
| RUSSIA | <u>Administrative sanctions</u> Individuals: 20,000 RUB | <u>Administrative sanctions</u> Individuals: 50,000 RUB Legal entities: -15 % of total earnings of the offender or -3 % of the total earnings of the offender (but not less than 100,000 RUB) or -50% of maximum starting price of contract (public procurement). | <single company> CJSC “Rosta” and PLC “Farmstandart”: 201,000,000 RUB (about \$6,483,870.97) |
| | | | <single case> 402,000,000 RUB (about \$12,967,741.94), in Pharmaceutical cartel (2008-2009) |
| SINGAPORE | no | <u>Civil penalties:</u> 10% of turnover of the business of the undertakings for each year, up to 3 years | <single company> Nachi-Fujikoshi Corp: SGD 4,773,423, in the bearing cartel |
| | | | <single case> SGD 7,150,852, in the bearing cartel |
| SOUTH AFRICA | no | <u>Administrative sanctions:</u> 10% of the firm’s annual turnover | <single company> ArcelorMittal South Africa: R1.5 billion rand (2016) |
| | | | <single case> R1.46 billion rand |
| SPAIN | no | <u>Administrative sanctions:</u> 10% of the total turnover of the preceding business year | <single company> €35,100,000, in the cartel case of adult nappies (2016) |
| | | | <single case> €131,450,493, in the automobile cartel |

| | | | |
|--------------------|----|--|--|
| SWEDEN | no | <u>Administrative sanctions:</u> 10% of the company's turnover of the preceding year | <single case> 497.5 million SEK, in the so-called Asphalt Cartel (2009) |
| | | | <single company> 200 million SEK, in the so-called Asphalt Cartel (2009) |
| SWITZERLAND | no | 10% of the undertaking's turnover of the last three years. | <single company> CHF 186,000,000 (2009) |
| | | | <single case> |
| TURKEY | no | <u>Administrative sanctions:</u> Up to 10% of the annual gross revenue of undertakings and associations of undertakings or the members of such associations generated by the end of financial year preceding the final decision (or where it cannot be calculated, annual gross revenue generated by the end of the financial year that is closest to the date of final decision) | <single company> Tupras Refinery: around € 137 million (2014) |
| | | | <single case> € 376 million, in the Banking case (2013) |
| US | no | <u>Criminal sanctions:</u> For undertakings: the greatest of: -\$100,000,000 or -twice the gross pecuniary gain or -twice the gross pecuniary loss caused to the victims of the crime by the conspirator For individuals: the greatest of: -\$1,000,000 or -twice the gross gain -Up to 10 years imprisonment | <single company> Citicorp: \$925 million, in the foreign exchange cartel (2017) |
| | | | <single investigation> \$ 2.9 billion |
| ZAMBIA | No | <u>Administrative sanctions:</u> For Companies: 10% of annual turnover For Individuals: 500 penalty units | <single company> ZMW 83,328.75 (roughly \$16,665.75) |
| | | | <single case> |

8. INTERACTIONS WITH DIRECT SETTLEMENTS

Plea bargaining or settlements with companies implicated in cartel conduct may be another factor that leads to a reduction in the fines that otherwise would have been imposed on these companies.⁷⁹ Settlements are particularly useful for those competition enforcers that have managed to establish a proven track record against cartels and thus in general, have been able to impose significant sanctions. In this way, competition enforcers have also been able to create a fear of detection among cartel participants through the use of their investigative powers. Finally, they have been able to put in place effective leniency programs that contributed to destabilise cartels, adding further to the risk of detection. The combination of these factors has increased the number of investigations carried out by those competition agencies. However the resource constraints faced by competition agencies make the timely investigation and resolution of cartel cases an ever greater challenge. For certain agencies this is only part of the picture as they also have to defend their successful cases before the courts. It is therefore not surprising that the issue of cartel settlements attracts growing interest among competition enforcement agencies.

In contrast to the 2008 report on fines, in which no more than 6 of the 22 responding competition agencies indicated that a form of settlement for cartel cases existed in their jurisdictions, in 2016, 19 out of 33 responding competition agencies dispose of some form of a settlement procedure in cartel cases, while a twentieth – Singapore – is currently developing a direct settlement procedure.⁸⁰ All these jurisdictions have indicated that in their system, it is possible for parties to benefit from settlements under certain conditions. Almost all of them also provided examples of cases in which settlements were used. The last decade has seen a steady trend towards the increased existence and use of settlement practice and procedures among competition agencies, which can be seen as the fruit of ICN work and publications on settlements, such as the Guidelines on Cartel Settlements in 2008, and the 2008 report on fines. The amount of reduction in fines for settlement varies in the jurisdictions.⁸¹

Jurisdictions with similar legal systems tend to have a similar method of dealing with settlements. In Canada and the US, plea bargaining is an essential component of the criminal justice system. In Ireland, an offer to plead guilty prior to trial may lead to a reduction of the charges by the public prosecutor. In Australia, cooperation with the investigation is submitted to the Court as a mitigating factor. In Canada, the US, and Israel, and in other jurisdictions where cartel fines are imposed by the court rather than the authority, the final discretion as to the sanction imposed rests with the courts.

Following the introduction of a settlement procedure by the European Commission, several individual European states have also started developing settlement practices in recent years. These authorities tend to make use of an administrative system, and tend to also have leniency programs. Some of these authorities, such as Hungary, work with formal written rules. Some, such as Germany, lack a statutory framework, but provide practical guidance to companies seeking to settle cases, in the form of an information leaflet. Others, such as the Netherlands, are developing their settlement practice on a case-by-case basis.

In Brazil, cartel participants who are involved in settlements deposit pecuniary contributions instead of fines. This contribution shall not be lower than the minimum fine applicable. The Colombian authority considers settlements as an exceptional mechanism, which means that they are only used if they contain

⁷⁹ This section develops the main elements concerning the determination of fines that can be found in the separate report on settlements presented by the ICN Cartel Working Group to the 2008 ICN conference and the 2016 update of the report.

⁸⁰ 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 indicate that they use settlement procedures, either directly, or in their submissions to the Court.

⁸¹ In some jurisdictions, certain percentages of reduction apply under the settlement rule, such as 10% in the European Commission, 15% in Greece, 30% in Hungary.

structural commitments. Although, the Colombians have regulated settlements, current policies observe settlements as an inappropriate solution in cartel cases. In recent years, they have focused primarily on the promotion of leniency programs, rather than applying settlement procedures.

Chart G: Existence of Settlement Procedures⁸²

| Settlement procedures in use | No formal settlement procedure but informal settlement possible | Leniency possible but no settlement in use |
|--|---|--|
| AU, AT, BR, CA, CO, EE, EU, DE, GR, HU, IL, NL, NO, PL, ZA, SE, CH, US, ZM | ES, LT, MY, RU, SG, TR | BG, SV, FI, IE, IT, JP, KR, MX |

8.1 Interplay of settlement and fines

One of the key issues that cannot be ignored while balancing the benefits and the risks of a settlement system is the discount a competition agency is prepared to grant companies in exchange for the settlement. Certainly, this is not the only benefit as a settlement system may also involve lower procedural costs for companies or reduced damage to reputation due to ‘naming and shaming’ as a cartel participant. However, discussions with the business community show that the degree of fine-reduction allowed by a settlement system remains pivotal for companies to decide whether to accept settlement proposals. The more specificity that the prosecuting agency can provide as to the amount of the fine and its determination, the easier it will be for the settling party to take a decision on the settlement proposal. To provide the greatest transparency, prosecuting agencies may enumerate, to the extent possible, the elements taken into consideration in determining the sanction, including the amount of reduction for leniency and or for settlement.

In jurisdictions where the maximum penalty for cartel conduct is not very high, the margin of maneuver for providing settlement incentives sufficiently attractive beyond those that can be provided under the leniency program is rather limited. As identified in the ICN Cartel settlement paper of 2008, this concern may be addressed by cumulatively or separately seeking to increase the level of sanctions and introducing other types of non-monetary incentives. The same measures would also increase the efficiency of leniency programs. This would suggest that the introduction of a settlement system is an option that can be considered by jurisdictions after having reached the objective of establishing a solid investigative record, setting high fines and having an effective leniency program.

A further aspect for reflection is whether the reduction in fines for settlement should be the same for all of the cartel participants who accept the settlement, or whether differentiation is possible and justifiable. Two situations can be distinguished depending on whether the competition agencies can only reward the first successful applicant (amnesty/immunity) or whether they can also reward a number of subsequent successful applicants that decide to cooperate.

In jurisdictions such as Canada, Israel or the US, cartel settlements can be seen as an investigative tool, with the objective of obtaining the cooperation of companies that can no longer benefit from immunity. Settlements can be considered as an equivalent, from an operational point of view, to the reductions in fines that other jurisdictions offer to successful leniency applicants after the first applicant. The overall reduction of the fines should therefore also reflect the degree of cooperation offered by the cartel

⁸² See Appendix 1 for the names of jurisdictions abbreviated in this chart.

participant and other elements like, for example, the timing and the quality of such cooperation. It becomes inherent to such system that the reductions of fines should be differentiated by company.

In the procedure of administrative settlement in the European Commission and individual European Member States, cartel settlements aim at achieving other functions like speeding up investigations by providing further incentives to the companies which cooperate with the agency but also to those companies which would like to cooperate but are not in a position to provide useful information to the agency. In addressing this issue, several options are possible: competition agencies or courts could grant higher rebates to the cartel participants which settle earlier, or on the contrary, higher rebates to the last cartel participants accepting the settlement, with the view of settling a case with all the participants. The latter position does not seem to be used in any jurisdiction as it would give more leverage to the companies who may choose to just wait and see.

The procedure of the European Commission is aimed at offering the same discount to all the companies that will accept a settlement. In the first place this is motivated by an EU mandated obligation of non-discrimination. This also ensures, in combination with the fact that the European Commission retains the possibility not to settle certain cases, that cartel participants will continue to apply for leniency in order to secure the leniency reduction on fines. It also prevents the entire process being held hostage by the last company or companies to settle, which could happen if the last companies to settle are better treated than the first. However, many authorities, including the European Commission, do have hybrid cartel cases, where some parties request and receive settlements, while others do not. While there are evident procedural advantages to running a case where all parties have agreed to settle, it is seen as unfair to refuse settlement to parties willing to cooperate, just because some of the other parties do not want a settlement.

8.2 Interplay of the reduction of fines for leniency and for settlement

Some jurisdictions that do not have a formal settlement procedure, such as Lithuania, Malaysia, Russia, Spain, Singapore (as long as their settlement procedure is not finalized) and Turkey do nevertheless consider pleas of guilt, co-operation in the course of the investigation and acknowledgement of the material circumstances as mitigating circumstances in the setting of a fine. Other jurisdictions, such as Bulgaria, El Salvador, Finland, Ireland, Italy, Japan, Korea and Mexico provide for leniency, but not for settlement.

In jurisdictions that have some type of leniency program, a majority of the investigations start on the basis of an amnesty/immunity application. Following the first investigative measures launched by the competitions agency, a number of other cartel participants can express their interest to cooperate in the investigation.

In jurisdictions where a reduction in fine can be obtained for leniency applicants other than the first, a settlement system must provide additional incentives, beyond those provided for under the leniency program, in order to induce settlements. However, the possible reductions of fine that can be obtained from leniency and from settlement have to be carefully balanced in order to ensure consistency and reciprocal strengthening between the two instruments.

It appears rather obvious that should the reduction in fines for settlement be too high, compared with the one offered under the leniency program, cartel participants would refrain from applying for leniency. They would, instead, wait and see whether the competition agency is able to bring a case against them. In the affirmative, they could always, in time, accept a settlement offer. In the negative, of course, there would be no case. This is not an optimal situation from the policy point of view that cartels should be found and sanctioned.

8.3 Interplay of settlement and deterrence

As mentioned in Chapter 2, a key objective of sanctions for most of the responding ICN members is to ensure appropriate deterrence.

When considering the option of introducing settlement procedures, it is necessary to balance their possible drawbacks in terms of moral justice and deterrence, since settling cartelists may be seen by the public as escaping the appropriate punishment, with the expected benefits which can be gained through settlements. An additional factor is that in many settled cases, the decision of the authority, or the court, may be less detailed than it would otherwise be, as there is no need for the authority to provide extensive evidence of facts where the parties have admitted their fault. This can make follow-on actions by private claimants more challenging, which may be seen as another drawback in terms of moral justice and deterrence.

Transparency and predictability in settlement policy and process appear to be critical to dispelling this public concern. In particular, penalties and sanctions imposed in settlement should continue to reflect adequately the seriousness of the settling party's conduct. The prosecuting agency should be allowed to use the key evidence provided by the settling cartel participants against those who do not settle. Another option would be to significantly increase the penalties for repeating the conduct in the future. Finally, it should be remembered that, as already mentioned above, one of the advantages of settlement procedures is also to save human and financial resources that would have otherwise been invested by the prosecuting agency to detect, find and, if competent to do so, fine all cartel participants. These resources are freed to deal with other cartel investigations, further increasing deterrence.

9. SUMMARY OF FINDINGS

9.1 *The role of fines*

9.1.1 The common element to the vast majority of responding agencies is that fines are used as deterrent rather than compensation. In particular, fines are intended to deter the addressees from engaging in the same illicit conduct in the future (i.e. specific deterrence), as well as to dissuade other potential infringers from forming or joining anticompetitive cartels (general deterrence). However, in some jurisdictions, deterrence is not the only objective and the fining policy in cartel cases pursues additional goals (such as retribution, recovery of excess cartel profits, punishment). These goals are not mutually exclusive.

9.1.2 In many jurisdictions, cartel fines imposed are higher than fines imposed for other anti-trust violations and in a number of jurisdictions more severe sanctions can be imposed on hard-core cartels than for other infringements of competition law, reflecting the consensus that hard-core cartels are the most pernicious of competition law violations and should be sanctioned as such.

9.1.3 Where fines are the only sanction, they must bear the entire burden of deterrence, and a priori may need to be higher than in jurisdictions where they are combined with other sanctions. The position of fines as the only sanction against cartels or one of a panoply of sanctions (together with jail sentences, other sanctions against individuals, civil damages, etc.) can potentially have an important impact on the approach to determining the amount of the fine.

9.2 *Key factors for the determination of fines*

9.2.1 Most of the responding agencies acknowledge that sufficient discretion is to be kept for the competent authorities in order to properly determine the amount of fine.

9.2.2 As regards fines imposed on companies, the measure quoted by most of the responding agencies, as a basis for the determination of the fine in cartel cases, is related to the concept of turnover/volume of commerce/affected sales in the cartelised product/service. The advantage of such data is that it is relatively easy to obtain, normally collected and audited and kept on record by the companies.

The alternative measure used by a number of jurisdictions is the illicit commercial gains obtained through the cartel conduct.

While in a certain jurisdiction, individuals involved in a cartel activity face the same fines as companies or a proportion of the fines imposed on the companies, in the majority of cases pecuniary sanctions imposed on natural persons are determined differently, and several jurisdictions cap fines for individuals at a lower level.

When the infringer is an association of undertakings, while some jurisdictions use the turnover of the members of the association as the basis of calculation of fines, half of the responding jurisdictions use the turnover of the association as the basis, with alternative basis or methods of calculating fines in case the association does not have its own turnover.

9.2.3 Generally the turnover/volume of commerce/affected sales relate to the value of business in the product/service in the affected geographical area of the cartel. The approach adopted in all systems

covered in this report is to impose sanctions on the specific undertakings engaged in the unlawful cartel conduct.

However, in more than half of the jurisdictions, the fine can be extended to the parent of wholly owned subsidiaries that have committed the infringement. Such an approach has an impact on the notion of recidivism, making the parent companies in question responsible for different infringements committed by different subsidiaries.

9.2.4 In some jurisdictions, not only direct sales of cartelized products but also indirect sales (e.g. the value of cartelised product contained in the sales of transformed product) could also be considered depending on the specifics of the case.

Certain jurisdictions responded that they take into account the sales of cartelists to another company in the same group which transforms the sold item and sells it on the market.

About one third of the respondents impose fines on a company that sells cartelized goods to another company in their own jurisdiction with the sales to that company as a basis for fines, even in a case the company produces finished goods which are sold in other jurisdictions. In a situation where cartelists sells cartelized goods in other jurisdictions, and then those goods are assembled into end products in those other jurisdictions, and later imported/sold in their own jurisdiction, a limited number of respondents replied that they impose fines on the cartelists.

9.2.5 Fines are in general related to the specific conduct of each participant in the cartel and modulated in broad terms by using a number of factors like the duration of the cartel and/or aggravating and mitigating circumstances attributable to each single participant. Almost all the agencies responded that multiple aggravating and mitigating factors are generally used to adjust the basic amount of fines. In particular, recidivism, role in the offence, and refusal to cooperate/effective cooperation are those factors considered by most of the jurisdictions.

9.2.6 In majority of the jurisdictions, non-compliance with procedural obligations (e.g. late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc.) can be subject to autonomous sanctions, whether or not a final decision on a substantive infringement is reached. The vast majority of jurisdictions use administrative sanctions.

9.2.7 Fines can also be reduced for companies that settle their cases with the competent prosecuting agencies. The last decade has seen a steady trend towards the increased existence and use of settlement practice and procedures; from 6 out of 22 jurisdictions in 2008, to 19 out of 33 jurisdictions in 2016. This is attributable to the growing fear of detection through the effective investigative powers, and allows competition agencies to resolve cartel cases more expeditiously, and to conserve resources.

9.2.8 The inability of a company to pay a fine appears to be a factor that is generally considered in the majority of the jurisdictions, either explicitly or implicitly. In certain jurisdictions, it is based on the consideration that the fine cannot be so high as to drive a company out of the market, thus causing additional harm to competition. Other factors, like the fact that the fine would impair the company's ability to make restitution to victims, can in some jurisdictions be taken in consideration as well. Some jurisdictions consider provisions setting a statutory maximum fine as a method of taking the ability to pay into consideration.

9.3 Transparency

For the general principle, for conduct to be considered as a crime/offence, there must be a legal provision establishing it. There must also be a legal provision imposing a specific punishment on the perpetrators of such conduct. A certain degree of transparency with regard to the determination of fines appears to be required with the aim of providing the appropriate incentives for companies to co-operate or settle with the authorities. To this effect, almost all the jurisdictions publish the reasoning underlying the fines regarding individual cases.

9.4 Developments in the last decade

All the responding jurisdictions have in fact imposed fines against cartelists, compared with the report in 2008 when a total of 3 jurisdictions responded with “No fines imposed yet”. In many jurisdictions, the level of fines has been significantly increasing over the years.

A variety of advances or reforms in the method of calculation of fines have been observed during the last decade, including, (i) introducing a certain percentage of turnover rather than a fixed cap, (ii) adopting imprisonment for cartelists natural persons, (iii) enhancing the severity of fines upon repeated cartelists as well as leading role infringers, (iv) introducing additional room to reduce fines with settling parties, (v) widening the range of increasing/decreasing fines in aggravating/mitigating circumstances. This clearly elucidates the fact that there is no single nor simple solution to effectively deter, detect and punish cartels.

APPENDIX 1

| | Abbreviation | | Abbreviation | | Abbreviation |
|----------------|--------------|-------------|--------------|--------------|--------------|
| Australia | AU | Greece | GR | Norway | NO |
| Austria | AT | Hungary | HU | Poland | PL |
| Brazil | BR | Ireland | IE | Russia | RU |
| Bulgaria | BG | Israel | IL | Singapore | SG |
| Canada | CA | Italy | IT | South Africa | ZA |
| Colombia | CO | Japan | JP | Spain | ES |
| El Salvador | SV | Korea | KR | Sweden | SE |
| Estonia | EE | Lithuania | LT | Switzerland | CH |
| European Union | EU | Malaysia | MY | Turkey | TR |
| Finland | FI | Mexico | MX | US | US |
| Germany | DE | Netherlands | NL | Zambia | ZM |

APPENDIX 2

ICN questionnaire on fines and fining methodologies in cartel cases updating the report on "Setting of Fines for Cartels in ICN jurisdictions" of 2008

A. Introduction

In 2008, the report on “Setting of Fines for Cartels in ICN jurisdictions” was compiled in order to elaborate a conceptual framework and the methodologies of fine determination in various jurisdictions where fines are imposed on hard-core cartels. After the original report was published about eight years ago, we have seen significant developments in fine-setting methodology. Against this backdrop, it is decided in the work plan 2016-2017 of Cartel Working Group that the Subgroup 1 will update the information in the 2008 report.

This questionnaire is prepared by putting necessary modifications and additional questions into the previous questionnaire, which was delivered to the member agencies of Cartel Working Group for compiling the original report in 2008. Therefore, the agencies which submitted the answer to the previous questionnaire⁸³ are simply expected to update the answer, whereas the other agencies are requested to prepare a new answer to this questionnaire.

B. Nature of the fines

1. What role does your Competition Authority (hereinafter, CA) have in determining fines in cartel cases? In your jurisdiction, are fines imposed by your CA or by other institutions?
2. What is the legal basis in your jurisdiction to impose fines for cartel conduct?
3. Since when has your jurisdiction been able to impose fines for cartel conduct?
4. Please explain the type and nature of fines (including pecuniary sanctions) in cartel cases in your jurisdiction: are they civil, administrative, criminal, other, or combined? (NB: issue also covered by question A, section 14 of cartel template)
If combined, what kind of factors/circumstances are taken into account in determining the combination (for example, *ne bis in idem* and double jeopardy)? Is it necessary to adjust

⁸³ Seventeen agencies replied to the previous questionnaire, representing the following jurisdictions: Brazil, Canada, the Czech Republic, the European Union, Hungary, Ireland, Japan, Jordan, Korea, Mexico, New Zealand, the Netherlands, Russia, Serbia, Switzerland, Turkey and the US.

the total amount of the fines by deducting a certain amount of one of the fines?
In any event, if fines are calculated through a combined approach, please explain major instances in which such an approach was taken.

5. Please also specify whether or not fines are imposed on the following (NB: issue also covered by question A, section 14 of cartel template):
 - a. specific companies or associations,
 - b. groups of companies (i.e. the company which directly participated in the infringement and its parent companies),
 - c. specific individuals who participated in the infringement, and
 - d. a combination of any of the above.
6. In relation to your answer to question B.4, can other types of sanctions (for example, imprisonment, disqualification, ineligibility for official bid/public tender), in addition to fines be imposed? (NB: issue also covered by question A, section 14 of cartel template)
7. In this case, does your CA or any other institution have the choice on the type and nature of the sanctions to be imposed?
8. In your jurisdiction, are there any statutory or legal limits as to the maximum and/or to the minimum amount of a fine that can be imposed on any of the above offenders or on types of infringements? (NB: issue also covered by question C, section 14 of cartel template)
On what theoretical grounds or concepts is the maximum and/or the minimum amount of a fine set?
9. What is the limitation period for imposing fines (if any) from the date of the termination of the infringement by which the investigation/proceedings must begin or a decision/judgement in the merits of the case must be made? (NB: issue also covered by question A, section 11 of cartel template)
10. What is the objective of fines in your jurisdiction is it <multiple answers allowed>
 - a. deterring the sanctioned companies or individuals to repeat the same conduct in the future?
 - b. deterring other companies or individuals to start a cartel or to join a cartel?
 - c. recovering the unlawful profits obtained by the cartel for the victims of the cartel?
 - d. punishment (i.e. recovering unlawful profits plus an additional fine)?
 - e. another one? (Please explain specifically;)
11. What is the largest amount of fines that have been imposed in your jurisdiction in a single company/legal entity/economic entity (choose the appropriate description in your jurisdiction)?

What is the largest amount of fines that have been imposed in your jurisdiction on a single case? Please also indicate when these largest amounts of fines were imposed.

C. Determination of fines

1. In your jurisdiction, are fines related in any way to:

- a. the nature of the infringing conduct;
- b. the gravity of the infringing conduct;
- c. other factors?

Please also define the meaning of these concepts in your jurisdiction.

2. In your jurisdiction, are fines related to:

- a. the global turnover of the firm/undertaking (whatever is appropriate);
- b. the value of sales/volume of commerce on the relevant market concerned (only in your jurisdiction or including in other jurisdictions) by the infringement;
- c. the additional profit made through the infringement;
- d. the consumer loss due to the infringement;
- e. the total loss of economic welfare;
- f. other? (specifically: _____)

3. If you replied to question C.2, please explain how the relevant factors you selected in the C.2. above are evaluated in determining the basis of fine in your jurisdiction?

Please indicate the legal basis for the method of calculation in your jurisdiction if any (for example, legislation, procedural rules, public notice, guideline).

4. If the infringer is an association of undertakings, are the basis of fines determined by:

- a. the turnover of the members of the infringing association of undertakings;
- b. the turnover of the association as a legal entity of its own;
- c. other?(specifically: _____)

If the turnover of members of the association of undertakings may be taken into account, under what circumstances is it possible?

5. If the basis for the determination of fines is a proportion of the company's sales, are these sales direct sales only or sales for the transformed product as well? For example, when the cartel members also transform the cartelised product and sells the transformed product (even not cartelised), is the value of cartelised product contained in the sales of transformed product taken into account?
Similarly, if a company (A) sells the cartelised product to another company (B) in the same group which transforms and in turn sells it on the market, are these sales (of B) taken into account for the determination of the fines imposed on (A)?
6. With regard to cartels formed by foreign companies, are fines imposed in your jurisdiction in the following cases? If yes, which amount of sales are used as the basis for calculating fines?
 - a) In your jurisdiction, cartel participants sold the parts (A) for which the cartel was formed, then the parts (A) are assembled into end products (B) in your jurisdiction, and all or most of the products (B) are exported and sold in other jurisdictions.
 - b) Cartel participants sold the parts (A) in other jurisdictions, then the parts (A) are assembled into end products (B) in the other jurisdictions, and the products (B) are imported and sold in your jurisdiction.
7. Please explain how, in your jurisdiction, the duration of a cartel has an impact on the determination of fines?
8. In the determination of fines are the following possibly "aggravating" factors/circumstances taken into account?:
 - a. recidivism,
 - b. role in the offence, being an instigator/leader/organiser of the conduct,
 - c. refusal of co-operation with the investigation,
 - d. obstruction of the investigation,
 - e. size of the undertakings,
 - f. high ranking or seniority of the personnel involved,
 - g. others (Please specify in C.13)

Please elaborate, how do these factors modify the determination of the fine? (For example, what kind of factors/circumstances are taken into account and how are fines increased?)

9. Other than increasing fines in the substantive case, are there any systems to impose fines for refusal of co-operation to, or obstruction of, the case investigation themselves as a separate procedure in your jurisdiction?
If yes, a) what is the legal basis to impose fines for them?
b) are fines imposed by your CA or by other authorities?

13. In addition to the factors mentioned in question C.8, are there in your jurisdiction any factors that can result in an increase of the fine for policy reasons etc., for example higher deterrence?
If yes, what kind of factors/circumstances are taken into account and how are fines increased?
14. If you have a leniency program that allows reductions of the fine other than complete immunity (i.e. reduction lower than 100%), explain how it interacts with other possible reductions (i.e. those mentioned in question C.11, for example, effective co-operation with the competition authority during the investigation)?
15. If negotiated/direct settlements with cartel participants are possible in your jurisdiction, explain their role in the determination of fines?
16. In cases where the fine determined on the basis of all the factors existing in your jurisdiction exceeds a statutory/legal maximum, are reductions for Leniency, Settlement or other reasons taken from the maximum?
17. Is the inability of an undertaking to pay the fine taken into consideration in your jurisdiction? If so, in which way?
18. If the system used in your jurisdiction differs from the structure followed in the present questionnaire, please explain how fines are determined in your jurisdiction.
19. If the method of calculation of fines has been reformed in your jurisdiction for last 10 years, please outline the contents and the reasons for the changes.

D. Transparency

1. In your jurisdiction, are guidelines or a methodology on determination of fines public? If not, are there any other public sources of information that explain how fines are determined?
2. In specific cartel cases, is the methodology or the actual reasoning that leads to the final amount of the fine explained or published (for example, in decisions of the CA, judgements of Courts or any other form)?