



International  
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International Competition Network  
Cartels Working Group  
Subgroup 1 – general framework

## SETTING OF FINES FOR CARTELS IN ICN JURISDICTIONS

Report to the 7th ICN Annual Conference  
Kyoto  
April 2008

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# 1. INTRODUCTION

The setting of fines on cartels is a topical subject. A number of jurisdictions have recently revised their legislation or guidelines on fines<sup>1</sup>. There is an active debate among competition enforcers and academics about the appropriate level of fines (and other sanctions) necessary in order to achieve deterrence. Increasing numbers of jurisdictions are tackling cartels for the first time, and thus confronting issues of how best to determine the fine to be applied. The subject of determining fines was also one of the subjects covered by a panel at the 2007 ICN cartel workshop.

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<sup>2</sup>. That report reviewed the different types of sanctions applied to cartels, and considered the issues relating to effectiveness and deterrence of sanctions on cartels. It covered issues such as:

- *the objectives of sanctions* (for most jurisdictions, the objective of deterrence outweighed that of retribution);
- *theoretical work on what kind of fines are needed to achieve deterrence*. In order to achieve effective deterrence and supposing that pecuniary sanctions are the only sanctions available, in theory the total amount of such sanctions should be more than the excess profit achieved by the cartel multiplied by the likelihood of detection. However, the first of these amounts is difficult to calculate, and for the second only estimates exist whose correspondence with reality is impossible to ascertain;
- *transparency of fine-setting methodologies*. Some jurisdictions adopt transparent mechanisms for setting fines while others prefer to leave an element of uncertainty as to the exact amount of the fine;
- The issue of *inability to pay* and possibly bankrupting companies with a fine;
- *Non-pecuniary sanctions*, such as imprisonment, community service, disqualification from company directorships, and publication of offenders’ names in newspapers.

For the 2007-2008 ICN year, the cartel working group decided to follow up on that work by focussing on fines, and examining in more detail issues linked to principles and methodology adopted by different jurisdictions for determining fines. It was decided to focus on fines, as opposed to other types of sanctions, because all jurisdictions which prohibit cartels have fines (on companies or on individuals) as one of their sanctions or in many cases their only sanction, regardless of whether the offence is civil, administrative or criminal in nature. Other sanctions, such as incarceration or disqualification, are only imposed in a smaller number of jurisdictions, and although they contribute to the objective of deterrence, they arguably involve less methodological issues.

The procedure for the work project involved the classic ICN tool, a questionnaire to agencies (members of the cartels Working Group)<sup>3</sup>. Seventeen agencies replied to the 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 United States of America<sup>4</sup>. Five further European agencies (those of Austria, France, Germany, Italy and Norway) referred to submissions which they had recently made in the context of an exercise by the group of European Competition Agencies regarding fines, which can be used in this context, although those submissions did not cover exactly the same subjects as the ICN questionnaire<sup>5</sup>.

<sup>1</sup> For example, the Russian Federation introduced new higher sanctions for competition infringements in 2007; the European Commission issued new guidelines on fines in 2006. Jordan has had the possibility to impose fines since 2002.

<sup>2</sup> 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](http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf)

<sup>3</sup> See annex 1 for the questionnaire used.

<sup>4</sup> The replies to the questionnaire were not intended for publication, and are therefore not annexed to this report.

<sup>5</sup> The ECA, not to be confused with the European Competition Network of the European Union, groups together the competition agencies of the EU and EFTA, and carries out projects on determined competition topics. Its first report on determination of fines in ECA jurisdictions was completed in December 2006.

The present report therefore only covers the fine-setting practice of those twenty-two jurisdictions. However, although those agencies represent less than a quarter of ICN member agencies, they also represent a majority of the cartel cases brought to conclusion in the ICN, therefore they can be considered as a representative sample.

The following agencies took part in the drafting of this report: DG Competition of the European Commission, the Italian Autorità Garante della Concorrenza e del Mercato, the French Conseil de la Concurrence, the Hungarian Competition Office (Versenyhivatal) and the Swiss Competition Commission. This report is submitted to the 7<sup>th</sup> annual ICN conference, in Kyoto, Japan, in April 2008, 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 be 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<sup>6</sup>. 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

It should be mentioned at the outset that the economic underpinning of fines, and the concept of the “optimal” fine was covered in the 2005 ICN report (see footnote 2 above). However, the link between theory of optimal fines for deterrence, and actual methodologies used for setting fines is often tenuous, partly because the statistical information needed to set economically optimal fines (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 dissuade other potential infringers from forming or joining anticompetitive cartels (i.e. general deterrence)<sup>7</sup>. Some agencies mentioned other aims in addition, others did not.

For example, a number of agencies have also mentioned the need to punish the corporate cartel participants of the infringement<sup>8</sup>, while a few respondents referred to the objective of recovering any unlawful gains obtained by the cartel participants at the expense of their customers<sup>9</sup>. Finally, the US and Canadian authorities indicated that, when determining the appropriate fines, courts must consider, *inter alia*, the need to provide restitution to any victims of the offence<sup>10</sup>.

Accordingly, 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*”

<sup>6</sup> 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.

<sup>7</sup> 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, Canada, Japan, Germany, the Netherlands, Hungary, Italy, the Czech Republic, Austria, Norway, Switzerland, Serbia, Russia, New Zealand, Jordan, Brazil and France.

<sup>8</sup> For instance the EU, the US, Germany, Hungary, Switzerland, Serbia, Jordan, Korea, Italy, Austria, Brazil and France. Punishment is considered the principal objective pursued through the imposition of fines by the competition authorities of Mexico and Ireland.

<sup>9</sup> The recovery of illicit gains has been indicated as an objective of the fining policy in cartel cases by the Swiss and 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.

<sup>10</sup> **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.

where it is possible to estimate that amount”<sup>11</sup>. The same principle applies in the Czech Republic and in Brazil. The agency of New Zealand indicated that the nature and the extent of any commercial gains flowing from the infringement are normally seen as the critical factor in ensuring the deterrent effect of the fine. In Hungary, the level of the fine is 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<sup>12</sup>. In Italy, any profits obtained through the infringement will be taken into account in the quantification process. Illicit gains of the offender must also be considered by Austrian and Jordanian courts when setting the amount of the fines.

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.

## 2.2 Legal basis for imposing fines

Although all of the jurisdictions concerned by this report have competition laws, sometimes the legal basis for imposing fines is found elsewhere than in the competition law itself. For example, in Russia, the legal basis for fining is found in the Code of Administrative Sanctions (which was modified only in 2007 to introduce fines for competition infringements). Member States of the EU are in the unique position of having two legal bases for sanctioning cartels, their national competition law, and, Regulation 1/2003 of the European Union<sup>13</sup>. Certain national competition laws have been amended at certain times, to change the nature of the sanctions imposed on cartels; for example, the Irish competition law was amended in 1996, to criminalise cartels and introduce the possibility of prison for cartelists.

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, 1986 in Korea). In Japan, criminal fines were possible from 1947 and could be imposed by courts on the condition that the competition agency filed an accusation; likewise in Korea, courts could impose criminal fines from 1980. In both countries, 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

Jurisdictions fall into three categories as regards the authority setting the fine. In the first group, it is normally a competition agency which sets the fine itself. In this category are Brazil, Czech Republic, European Union, Hungary, Italy, Mexico, Netherlands, Russia, Switzerland and Turkey. In this context it should be pointed out that in jurisdictions where there is a dual competition authority, there is one competition agency carrying out investigations and a specialised competition court, or higher agency, taking decisions and imposing sanctions (Brazil and South Africa would fall in this category for example).

In a second category of jurisdictions it is a non-specialised court which adjudicates in competition cases. This is the case of Canada, Ireland, Jordan, New Zealand, Serbia and the USA. These are sometimes, but by no means always, jurisdictions in which sanctions are criminalised. In the USA and Canada, cartels are always

<sup>11</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

<sup>12</sup> In this context, it should also be noted that in the US the maximum penalty for undertakings engaging in cartel activity is currently the greatest of 100 millions USD, twice the gross pecuniary gains the conspirators derived from the crime, or twice the gross pecuniary loss caused to the victims of the crime. Similarly, in New Zealand the maximum level of fines applicable to undertakings engaging in cartel activity is the greater of 10 millions NZD, three times the value of any commercial gains resulting from the violation, if such gains can be readily ascertained by the courts, or 10% of the consolidated turnover of the offender, whenever the commercial gains cannot be readily ascertained.

<sup>13</sup> 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.

prosecuted as criminal offences, and sentences are imposed by courts<sup>14</sup>, while on the other hand in New Zealand and in Jordan fines are civil in nature but imposed by courts. In Ireland, the competition authority may choose to prosecute a cartel using civil, not criminal, penalties, in which case both the burden of proof and the fines are lower, but in both cases the fine is set by a court (the procedure is termed “injunctive and declaratory relief” in the case of civil enforcement).

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 (membership of this category, and the first mentioned above can thus overlap). 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<sup>15</sup>. 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. France also falls into this category. In Hungary, since September 2005 the law foresees the possibility of imposing criminal sanctions for certain types of hardcore cartels (public procurement and concession procedures), thus potentially allowing Hungary to be classified in this category too.

## 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.

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. However, only a minority of agencies (agencies of the Czech Republic, the European Union, Italy, Jordan, Mexico, and Switzerland) indicated that fines (on companies and/or individuals) are the only sanction available to them. Incarceration of individuals involved in the cartel is available in the following jurisdictions: Brazil, Canada, France, Hungary, Ireland, Japan, Korea, and the USA. 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<sup>16</sup>. 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 with very high ones, especially for recidivists<sup>17</sup>. This is borne out in the level of fines imposed by the European Commission. The highest fine which it has ever imposed on a single company is just under €480 million (imposed on Thyssen Krupp – elevators and escalators case). However, it should be pointed out that the USA, which also has imprisonment as a sanction, has imposed a fine of Hoffmann-La Roche of \$500 million (approximately €342 million at current rates), for its role in the vitamin cartel. The highest fines reported by other jurisdictions were of a lower order<sup>18</sup>.

<sup>14</sup> In the USA, a certain type of negotiated settlement in a cartel case (known as type ‘C’ agreement) requires that once a court accepts the agreement, the court must impose the agreed amount of the fine. See chapter 8 below, and the separate report on settlements presented by the ICN cartel Working Group to the 2008 ICN conference.

<sup>15</sup> 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).

<sup>16</sup> Prison terms available for cartel offences are as follows: Brazil (from 2 to 5 years), Canada (up to 5 years), France (up to 4 years), Hungary (up to 5 years), Ireland (up to 5 years), Japan (imprisonment with work), Korea (up to 3 years) and US (up to 10 years).

<sup>17</sup> The 2006 fining guidelines of the European Commission allow fines to be increased by 100% in the case of recidivists. See chapter 6 below.

<sup>18</sup> For example: in Canada: C\$48 million (around €32 million), in Japan ¥2 400 million (around €15 million) (there is a fine of ¥7 000 million currently under appeal), in Korea 113 billion won (around €82 million).

Although fines and incarceration are the most widely-applied sanctions, a wide range of other sanctions also exists in different jurisdictions. In Brazil, different kinds of administrative punishments are available: for example, a half-page publication of the summary sentence in a court-appointed newspaper at the cartel's expense; ineligibility for official financing or participation in bidding processes; the infringement can be included in the Brazilian Consumer Protection Registry; there can be a recommendation to (a) grant compulsory licenses for the patents held by the cartel participant and (b) deny the cartel participant the possibility of paying overdue federal debts in instalments, or order the total or partial cancellation of tax incentives or public subsidies; the company's spin-off or transfer of corporate control; sale of assets; partial discontinuance of the activities. In France too, injunctions to publish a summary of the decision finding an infringement are available and increasingly used in so far as they contribute to advocate competition and to foster deterrence. In Canada, a prohibition order of up to 10 years to prevent repetition of the offence in the future can be issued by the court. Disqualification of the individual who acted on behalf of the company is possible also in Russia, whereas in New Zealand, there is the possibility of banning an individual who has been convicted of participation in a cartel from management of any body corporate for up to 5 years. Other sanctions are provided in New Zealand, aiming to reduce the ability of individuals to avoid fines for cartel conduct. It is forbidden there for the body corporate to indemnify a director, servant, or agent in respect of the liability for payment of a pecuniary penalty or cost incurred by the above mentioned person in defending or settling any proceeding relating to that liability.

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, Ireland (the civil action can be taken in alternative or in addition), New Zealand, US, Switzerland and Japan.

### 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. Competition rules of most countries 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 term “undertaking” can be interpreted in a different, sometimes quite extensive way. 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 liable for the conduct of one of its subsidiaries, when the parent determined 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 by the Czech Republic, European Commission, Hungary, Italy, Korea, Netherlands, New Zealand, Serbia, Switzerland and Turkey.

The first consequence of such an approach, for the European Commission, 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 Community 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 able to exercise 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 Commission may also have to determine who their legal or economic successors are.

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 prevents the possibility for certain large groups to participate in cartels via one of their very small subsidiaries, with the idea that the maximum statutory limit of the fine would be applied to the size of the small subsidiary in question.

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. The logic behind these systems is that the imposition of sanctions only on the undertaking cannot ensure adequate deterrence. Undertakings are engaged in cartels through the conduct of their representatives who are natural persons. Sanctions imposed on individuals can therefore complement fines imposed on corporations/undertakings and enhance deterrence. For this reason, several countries provide their responsible authorities with the possibility to impose fines on natural persons involved in cartel conduct. This approach has been adopted in Brazil, Canada, Ireland (fine for procedural breaches can be imposed only on individuals), Japan, Jordan, Korea, Mexico, Netherlands, New Zealand, Serbia, Turkey, US and France (where such fine can be imposed by courts). In Switzerland, a pecuniary sanction may be imposed on specific individuals if they intentionally violate an amicable settle-

ment<sup>19</sup>, a legally enforceable decision or a decision of an appeal body. 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 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 EC and the United States, 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 and the more likely they will self-report such conduct after it has occurred 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 in front of 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 with 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 concerned by 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 case of 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. Brazil, Ireland, New Zealand and Canada are examples. However, in the absence of sentencing guidelines, the sentencing in Canada is based on Competition Act, case-law and Criminal Code; a Leniency and Sentencing bulletin is in the process of finalisation to respond to this lacuna. In New Zealand the legal basis for imposing fines for cartel conduct is outlined in the Commerce Act 1986. In some jurisdictions, there are no guidelines available, even though the fine is set by the agency. In such cases competition agencies have at least the legal limitation to the amount of fines they can impose (e.g. Brazil). Russia and Serbia do not have any methodology

<sup>19</sup> i.e. once it is considered that a restraint of competition is unlawful, the Swiss competition agency may propose so-called “amicable settlement” to undertakings; such settlement shall be put down in writing by undertakings and must be approved by the competition agency.

for the determination of fines; however, no fines have so far been imposed on cartels in those jurisdictions. 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 Hungary, certain criteria which must be taken into account when imposing fines are mentioned in the Competition Act. The same applies in the Netherlands, which also has a published Fining Code. 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, and guidelines are therefore considered unnecessary. In Mexico the Federal Law of Economic Competition sets out the elements that shall be considered when imposing the fine and there are no guidelines or methodology 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.

In some countries, such as France, the main fining criteria are set out by the law (commercial code), but the French Competition Council has also published a document in its 2005 annual report which explains in further detail how these criteria are implemented.

Jurisdictions in which the law itself does not set the methodology or principles for the determination of the fine, but the agency has made guidelines available publicly are: EU, Czech Republic, Jordan and Korea.

In the EU, the European Commission has published guidelines on the determination of fines concerning anticompetitive conducts since 1998<sup>20</sup>. These guidelines were amended in 2006<sup>21</sup>. The rationale for the 1998 Guidelines also mentioned in the 2006 Guidelines is to ensure the transparency and impartiality of the Commission's decisions<sup>22</sup>. This must be combined with the objective of reaching 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, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).

The guidelines aim at limiting the Commission's discretion, which otherwise would only be bound by the statutory maximum of 10% of the annual world-wide 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 determining fines, the Commission must in fact take account of the Guidelines when determining fines, in particular the elements which are mandatory under the Guidelines"<sup>23</sup>.

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.

### 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.

<sup>20</sup> 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 OJ C 9, 14.1.1998, p. 3.

<sup>21</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, p. 2.

<sup>22</sup> Transparency means guidance for the legal and business community concerning the criteria that the Commission will follow in the determination of a fine. It also means a certain degree of predictability regarding the level of fines that can be imposed, in the sense that the fines are better related to the characteristics and circumstances of an individual cartel.

<sup>23</sup> Judgement of the Court of First Instance of the European Communities of 15 March 2006 in Case T-15/02 BASF AG vs. Commission, paragraph 119.



In 14 of the jurisdictions which replied to the questionnaire the reasoning of the fine is made public<sup>24</sup>. In some jurisdictions where this is not the case, it is 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. This is the case in Ireland. Other responding agencies in this situation added that no decisions with fines have been adopted yet in their jurisdiction (Serbia, Russia). Penalty judgements with reasoning once reported are publicly available in New Zealand.

In jurisdictions where decisions imposing fines are always published, the amount of reasoning as to the amount of the fine and the process for determining it varies. 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 of the decision summarizes the most important circumstances and the methodology which led to the final amount of the fine. Also in Japan reasoning that leads to the amount of fine is explained and published in decisions of the Japanese Fair Trade Commission.

Decisions with methodology that leads to the final amount are also published in Netherlands and Brazil. In the USA, courts are required to state in open court at the time of the sentencing the reasons for imposing the particular sentence and, in some cases, to provide specific reasons in a written order. In Canada the reasoning of the judge's findings is available to the public (there is usually a press release and a summary of the matter published on the website of the competition agency). In Turkey the Competition Board decisions include explanations on how the existence of intent, the severity of fault, the market power of the undertaking(s) upon which a penalty is imposed are taken into account. These decisions also cite aggravating and mitigating factors. For the time being Turkey has no separate guidelines on the determination of fines for the decisions issued by the Competition Board but draft guidelines are under preparation, which are intended to be made public.

In the Czech Republic, France, Italy and the EU all decisions imposing fines contain 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. It happened recently that, for the first time, the Court of First Instance of the European Communities decided to increase the amount of the fine imposed by the Commission<sup>25</sup>. In addition to the review by the Courts, Commission decisions are also generally published in full version (except 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.

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<sup>24</sup> Brazil, Canada, Czech Republic, France, Hungary, EU, Italy, Japan, Korea, Netherlands, New Zealand, Switzerland, Turkey and USA.

<sup>25</sup> Judgment of the CFI of 12 December 2007 in Case T-101/05 and T-111/05 *BASF and UCB v Commission*.



## 4. TYPES OF FINE-SETTING SYSTEMS AND UNDERLYING PRINCIPLES

### 4.1 Undertakings

#### 4.1.1 The concept of company turnover

The concept of ‘company turnover’ is referred to here mainly as 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 basis for the determination of the fine in cartel cases, is related to the concept of company turnover<sup>26</sup>. Familiar as it may sound, a company’s turnover is not a very clear concept and jurisdictions vary in its understanding. There are additional characteristics to define this concept more narrowly, for example whether it refers to the product-related turnover of the perpetrator of the offence or the total turnover of this company in the jurisdiction at hand or even to the world-wide 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 (EU for example) or the volume of affected commerce (US and Canada for example). Usually the fine will be determined for a start as a percentage of this measure. 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 Global turnover

A number of responding agencies quoted the 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 global turnover. In some cases, this will be the overall consolidated turnover realised by the offender and its subsidiaries worldwide in the relevant business year (the last year of the infringement or the year before the finding of the infringement)<sup>27</sup>. In Switzerland, fines are set with reference to the turnover achieved in the relevant market by the undertaking concerned in the last three business years at national level. In France, the global turnover taken into account is *“the highest worldwide turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented.”*

Some 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 case<sup>28</sup>. For instance, in Serbia the fine is determined as a percentage between 1% and 10% of the total turnover of the undertaking concerned, taking into account the seriousness and the impact of the infringement, as well as its circumstances, the degree of fault, the personal conditions of the offender and its conduct after the commission of the infringement. In New Zealand, reference to the consolidated turnover of the offender is only made by the courts when the commercial gains flowing from the infringement cannot be easily calculated. In Brazil the measure is the gross post tax revenue of the company in Brazil during the last year of the infringement.

In other 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 of the final amount of the

<sup>26</sup> An exception is Mexico, where cartelists face fines up to the equivalent of 1 500 000 times the general minimum wage in the Federal District, and their level is set in light of the specific circumstances set in the Law on Economic Competition. The US and Canada both rely on the volume of affected commerce as the basis for determining fines.

<sup>27</sup> On the notion of global turnover see also chapter 7 on minimum and maximum fines.

<sup>28</sup> Notably Serbia, Ireland, and Brazil.

fine, since in these jurisdictions the statutory ceiling of the applicable fine is set as a percentage of the total turnover of the undertaking.<sup>29</sup>

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 European 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*”. In this case it is worth noting that the global turnover taken into account by the European Commission is the world-wide 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 cartelised product and the totality of this undertaking’s commercial activities.

Pursuant to paragraph 35 of the Dutch Fining Guide, “*from the perspective of the desired preventive effect, the starting point may be adjusted with a view to the size of the offender, expressed in the total annual turnover of this offender in the Netherlands in the business year preceding the fining decision*”. Paragraph 15 of the guidelines on the setting of the fines applied by the German competition agency states that “*for deterrent purposes the basic amount can be raised by up to 100%. The size of the undertaking concerned is particularly decisive for such an increase*”. The Czech authority also expressed its willingness to adjust the fines to ensure that larger undertakings are adequately deterred from engaging in cartels.

#### 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 15 responding agencies<sup>30</sup>. In most cases the calculation of the fines will be based upon a given percentage of the relevant measure. In Norway, however, the level of fines results from an overall assessment of all the circumstances of the case, whereby in practice the value of sales on the relevant market and the global turnover of the undertaking concerned will be of greater relevance.

In the EU, the Commission in determining the basis for setting the fine refers to the value of sales of the goods or services to which the infringement relates. The value of sales in this context refers to the sales of the cartelised product(s) in the geographic area concerned in the EU or EEA. The combination of the value of sales to which the infringement relates and 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*”<sup>31</sup>. 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 Guidelines<sup>32</sup> 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. More specific issues relating to the determination of the value of the cartelised product include whether inter-cartel sales or captive sales are calculated. The EU and the US generally exclude sales of the cartelised products between the cartel members. As regards captive sales i.e. sales which are used by the undertaking in the production of a downstream product, the issue of whether to take these into account would depend on the specifics of the case. The US would avoid double counting and look in depth at where the US consumers have been impacted by the cartel behaviour, in the EU

<sup>29</sup> This is the case for the EU, Germany, the Netherlands, Hungary, the Czech Republic, Italy, Austria, Switzerland, Russia, Norway, Korea and France.

<sup>30</sup> Notably the EU, the US, Canada, Japan, the Netherlands, Italy, Hungary, the Czech Republic, Austria, Switzerland, Jordan, Korea, Norway, Russia and France.

<sup>31</sup> European Commission’s guidelines on the method of setting fines, paragraph 6.

<sup>32</sup> The US Sentencing Guidelines set out a uniform sentencing policy for convicted defendants in the US federal court system. The guidelines are discretionary but any sentence outside the range established by the Guidelines requires an explanation by the judge.

these types of downstream sales depending on the specifics of the case may count as sales indirectly related to the infringement, so long as there is no double counting.

Other agencies suggest that the relevant turnover can provide a rough indication of the potential gains deriving from the cartel. According to paragraph 11 of the 2007 Fining Code applied by the Dutch authority, *“the higher the relevant turnover, the greater the economic impact of the infringement generally, including the potential gains to be made by the offending party or offending parties.”* The Dutch agency also stated that the percentage of the relevant turnover which is taken as a starting point to calculate the fine more or less reflects the general level of gains made, but is not intended to be a precise or case by case approximation thereof. The Canadian Competition Bureau clarified that the percentage of the affected volume of commerce multiplied by an overcharge factor is taken as a starting point for its recommendation of a fine put to the courts and is considered a proxy of the magnitude of economic harm caused by the cartel; this *“figure reflects a number of considerations, notably the degree of ‘overcharge’, the exclusion of consumers from the market as a result of higher prices and the general and specific need to deter illegal behaviour”* (which is usually 20%). In calculating the volume of affected commerce the Canadian Competition Bureau includes only direct sales of the cartel participant in Canada but specifies that it may find it appropriate to include indirect sales to properly reflect the magnitude of the effects of the offence in Canada.

Some agencies<sup>33</sup> however, pointed out that the quantification of fines does not merely result from a mathematical approach based on the volume of affected sales, since competition authorities retain a wide margin of discretion. For instance, the Canadian system stresses that fines cannot always be the result of a mathematical approach based purely on the volume of commerce. The same approach may be found in Germany and in the Dutch guidelines, which state that: *‘the setting of fines...is not a matter of purely arithmetic models. Neither does the Board determine the economic impact of an infringement by means of arithmetic methods’.*

## 4.2 Individuals

A number of jurisdictions may impose either administrative or criminal pecuniary sanctions on individuals involved in cartel activity<sup>34</sup>.

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 elements as to the criteria for determining 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 those jurisdictions which target specific conduct of individuals. For instance, the Dutch agency 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 whenever they intentionally fail to comply with an amicable settlement, a legally enforceable decision of the competition authority or a decision of an appeal body. In France, only those individuals that have played *“fraudulently, a personal and determining role”* in the infringement are liable to be fined by the courts.

The Brazilian agency can impose administrative fines on managers directly or indirectly responsible for a cartel where their company was involved, ranging from 10% to 50% of the fine imposed on the undertaking. Lower fines can also be imposed on other natural persons involved in the cartel activity.

<sup>33</sup> Including Canada, Hungary, Italy, France, New Zealand and the EU.

<sup>34</sup> These include the United States, Canada, Russia, Germany, New Zealand, Ireland, Jordan, Mexico, Switzerland, Turkey, Brazil, Netherlands and France.

In addition, the treatment of individuals participating in cartel infringements may be distinguished with reference to the maximum level of fines. While in some jurisdictions, such as Jordan, Ireland and Canada, individuals involved in cartel activity face the same fines as undertakings, in the majority of cases pecuniary sanctions imposed on natural persons are statutorily capped at a lower level, often at a fixed figure.

## 5. DETERMINATION OF THE BASIC FINE

The concept of basic amount of the fine is not common to all jurisdictions as it implies the application of a structured methodology for the application of fines. Especially in jurisdictions where the final determination of the fine is left for the courts – see, for example, Austria, Ireland and Canada – but also jurisdictions where fines are set by the Competition Authority – see for example Norway, there does not appear to exist any specific fining-setting methodology; fines are thus determined on the basis of certain relevant factors which are considered in no specific order, however some of them may play a bigger role (such as volume of commerce in Canada or turnover in Ireland).

Yet, most jurisdictions are acquainted with the concept of basic amount, at least in respect of penalties which are applied to companies<sup>35</sup>.

By and large, all responding authorities recognise that the amount of the fine depends on the gravity (16 replies) 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/seriousness of the infringement). For example, in Turkey, the market power of the undertakings is also taken into account in the determination of the fine. Mexico values the degree of premeditation. 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, if there is a spill-over effect on other markets) are also taken into account. In the EC, in assessing the basic amount of the fine, various factors are taken into account 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.

### 5.1 *Basis for calculation* (Percentage of turnover/volume of commerce/market shares/illicit gain)

It can be observed that a great majority of the authorities refer to the turnover/volume of affected commerce of the undertaking as the basis for the calculation of the fine, the general view being that this concept provides a good proxy for assessing the gravity of the behaviour, both in terms of (presumed) damage to consumers and illicit gain. Furthermore, such data is relatively easy to obtain.

However authorities do not always refer to the same amount or concept of turnover (in this respect see chapter 4)<sup>36</sup>. In some jurisdictions (13 out of 22), the turnover used as basis for the calculation of the sanction is the value of sales of the products/services concerned by the infringement. In such jurisdictions the identification of volume of commerce concerned will be of high importance, as it impacts on the level of the fine imposed.

Other jurisdictions consider global turnover or national turnover. In Serbia, for instance, the global turnover of the undertaking is taken into account whereas in Brazil, the Brazilian turnover is taken in consideration. In Brazil the fine must by no means be lower than the advantage obtained from the underlying violation, if the advantage is measurable. In Turkey, recent amendments in the Competition Act replaced fixed amounts of procedural fines with fines calculations based on annual gross revenue provided that they are no less than 10000 Turkish liras.

The benefit resulting from the violation of the competition law is in fact considered by 9 competition authorities. According to the Hungarian guidelines any fine calculation is superseded if the gains derived from the infringement may be quantified. In these situations – in order to ensure the “sufficiently deterrent effect”, the amount

<sup>35</sup> 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 to individuals and procedural fines (whether periodic or not) are usually calculated according to different principles.

<sup>36</sup> Ireland mentions that the turnover is the only basis for fines, it is not clear which actual amount is taken into consideration.

of fine is calculated as three times of the quantified gain. This possibility however, has not been applied during the first five years of the sentencing guidelines.

In New Zealand, courts are required to consider first the nature and the extent of any commercial gain arising from the conduct. If the commercial gain cannot be readily ascertained, then a proportion of turnover of the body corporate and all of its interconnected bodies corporate (if any) would be considered. 'Turnover' in this case is defined in section 2 of the Act, as the total gross revenues (exclusive of any tax required to be collected) received or receivable by a body corporate in an accounting period as a result of trading by that body corporate within New Zealand.

In Italy and Hungary, turnover in the affected market is not directly considered when determining the sanction. However, the relative position of the involved undertakings in the relevant market (based on market shares) is significant when evaluating the gravity of their behaviour.

## **5.2 How calculations work**

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 cartel (3 years at a maximum). Sales values are multiplied by rates (determined by law) which vary depending on certain business categories. The size of the enterprises is also taken into consideration. Indeed, if the amount of capital or the contribution number of regular employees is small, the calculation rate will be reduced.

In Korea, surcharge imposing rates are classified into three categories (0.5~3%, 3~7%, 7~10%) depending on the degree of seriousness (not serious, serious, very serious). The basic surcharge results from multiplying such rates by the cartel-related turnover. Whenever it is difficult to calculate the relevant turnover, the basic surcharge is established in a certain amount decided on the basis of the seriousness of the infringement.

In Mexico the fines imposed to companies could range between 1 and up to 1 500 000 times the general minimum wage in the Federal District.

In Canada, the basic fine is calculated as 20 percent of the affected volume of commerce in Canada. The 20 percent figure reflects a number of considerations, notably the degree of 'overcharge', the exclusion of consumers from the market as a result of higher prices and the general and specific need to deter illegal behaviour. There will, however, be other factors relevant to a recommended fine level and the overall objective to secure deterrence.

In the USA, the Sentencing Guidelines provide that 20 percent of the volume of affected commerce is used to determine the base fine for corporations.

In Czech Republic the variable amount of the basic amount is determined through the multiplication of the percentage applied to the value of sales by the number of years (coefficient) of duration of the infringement. When the infringement lasts less than 1 year, the coefficient is equal to 1.

In France, the criteria to be taken into account that are stated by the French commercial code, are that the fines must be proportionate to (i) the gravity of the infringement, (ii) the importance of the damage caused to economy, (iii) the situation of the company concerned or the group to whom it belongs and (iv) the reiteration of practices prohibited by French competition law.

In the EC, 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 hardcore cartel.

### 5.3 In the absence of a basic amount

In Austria, the legislative conditions applied by the competition authority (Bundeswettbewerbsbehörde or BWB) to determine a fine are (non exhaustive list) the gravity and duration of the infringement, the additional profit made through the infringement, the level of default, the undertaking's ability to pay, its co-operation with the competition authority, recidivism. The same criteria are also applied by the Cartel Court which decides on the final amount of the fine. The Austrian authority takes the additional profit made through the infringement in consideration in the calculation of the fine.

In Norway, particular consideration shall be made to the undertaking's turnover and the gravity (the character of the infringement, the actual impact on the market, the size of the relevant market, the undertaking's reward, the guilt exercised, whether the infringer held a leading or passive role in the infringement) and duration of the infringement. Other elements that can influence the calculation are, *inter alia*, whether agreements or measures are implemented, whether the undertaking by guidelines, instructions, training, controls or other measures could have prevented the infringement, whether the undertaking has assisted the Competition Authority in its investigation of the infringement and the economic viability of the group to which the undertaking belongs.

### 5.4 Duration

Duration can play a different role in the calculation of the fine. Some authorities consider it to be relevant for the calculation of the fine, while others (see Jordan for example) do not.

Six authorities<sup>37</sup> mention the duration as having importance in the calculation of the fine but without explaining in details its impact.

Four authorities<sup>38</sup> deem that the time dimension 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.

Five jurisdictions<sup>39</sup> consider the duration as a mitigating or aggravating circumstance depending on the relative length of the infringement.

Six authorities<sup>40</sup> 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 duration of the infringement.

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<sup>37</sup> Mexico, New Zealand, Ireland, Austria, Germany, Italy.

<sup>38</sup> The Netherlands, Russia, USA and Germany.

<sup>39</sup> Japan, Canada, Serbia, Turkey, Brazil.

<sup>40</sup> Switzerland, Czech Republic, EC, Hungary, Italy, Norway.





## 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, 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.

Seven out of the 22 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 Jordan and 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*

Repeated offenders are exposed to increased penalties in most jurisdictions (19 out of 22 indicated this factor among the most serious ones).

Limitations however apply in some jurisdictions to the possibility of making a finding of recidivism. So, for example, in Germany recidivism can normally be found only in situations where the second infringement has started within 5 years from the date on which the first decision has become final. In Japan, 10 years must not have elapsed until the second order. In the US, the prior similar misconduct must also have taken place within the last 10 years. In Serbia, 2 years.

In the EU, where all Member States can apply both Community and national competition law, recidivism can sometimes take into account previous infringements of Community competition law found by other EU competition authorities (including the European Commission). This is clearly the case in the Netherlands. 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, European Union<sup>41</sup> and Hungary – or 1,5 – e.g. in the Czech Republic). In Mexico, the Federal Competition Commission can either double the fine or impose a fine up to 10% of the annual sales of the infringer during the previous fiscal year or up to 10% of the value of the assets of the infringer, whichever is higher. In Japan, the law provides for the calculation of fines (in the form of surcharges) to be increased by 50%. In France, the French Competition Council developed its approach on recidivism in its decision dated 15 October 2007 concerning the market for high-speed Internet access whereby it doubled the original fine imposed on France Telecom taking into account similar repeated infringements previously penalized by the French Competition Council.

#### 6.1.3 *Role of the undertaking in the infringement*

Two thirds of the responding authorities (14 out of the 22) take ring-leadership as an aggravating factor. Under the EU practice this aspect may result in up to 50% increase of the fine.

<sup>41</sup> The 2006 Guidelines treat recidivism as a particularly severe matter. The fine applied for repeat offenders may be increased by up to 100%. Previously this aggravating circumstance justified increases up to 50%.

### 6.1.4 Refusal to cooperate – obstruction<sup>42</sup>

The questionnaire asked how cooperation by the defendant is taken into consideration both in terms of aggravating and mitigating the amount of fine. Altogether 15 fine calculation methods consider these elements in one way or another.

Refusal to cooperate could lead to increase the fine in 15 competition fine calculation systems. As an interesting solution, the Dutch fining guidelines allow the NMa to impose a separate fine for refusal to cooperate up to 450 000 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 13 fining regimes (e.g. in the US, EU, Jordan, Korea, Netherlands, Turkey, Serbia, New Zealand and Switzerland). In the US wilful obstruction or attempted obstruction of justice during the investigation, prosecution or sentencing the offence can be considered as aggravating factor or charged as a separate criminal offence where appropriate.

To note that 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. Where a decision on a substantive infringement is eventually reached, the procedural (mis)behaviour of the party can still be considered as an aggravating factor, whether or not it attracted separate procedural sanctions. The existence and the application of such procedural sanctions do not normally prevent the application of increases to the fine applied in a final decision on the merits (e.g. EU).

### 6.1.5 Others

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

- If the offence involved vulnerable victims, this may be taken into account in determining the amount of the fine within the applicable fine range (US, Canada);
- the degree of premeditation is considered by Mexico, but Germany also takes into account “serious forms of deliberate intent and negligence”;
- the continuation of infringing conduct qualifies as aggravating situation by the Russian, Korean and Turkish competition authorities;
- if the offender made efforts to control the compliance of the illegal conduct it is deemed as basis for aggravation by the Dutch and also by the Turkish competition authorities;
- the high ranking or seniority of the personnel involved are contemplated by the US, Korea and New Zealand;
- some jurisdictions (e.g. Turkey) attribute an aggravating/attenuating effect to the importance of the affected product or the overall financial/economic strength of the offender;
- Brazil considers the “extent of damages or potential damages to competition, to the Brazilian economy, to consumers or to third parties”.

## 6.2 Mitigating elements

### 6.2.1 Effective cooperation

The most accepted mitigating factor is if the defendant shows willingness of cooperation. In different forms this is taken into consideration in 12 fining policies. In the US reply “*reporting the offence to the government*”

<sup>42</sup> 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](http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ObstructionPaper-with-cover.pdf))

*and cooperating in the investigation*” are mentioned at the first and second places as mitigating circumstances *“that can reduce the fine range for cooperation”*. Likewise, *“the court may reduce the imprisonment and fine ranges for an individual or fine ranges for corporations based on substantial assistance in the investigation or prosecution of others”*. The European Commission would only value cooperation within the frame of the EU Leniency programme. Most answers do not outline the necessary degree of cooperation and the fact whether cooperation should be understood, as cooperation within Leniency or if it is possible outside the scope of the Leniency programme.

### 6.2.2 Immediate termination of the infringement

Immediate termination of the infringing conduct can cause reduction of the fine in 10 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. In the Czech Republic, early termination must occur before the launch of the investigation or at the latest immediately after the first investigative measure in the proceedings. The Dutch guidelines state that voluntary termination of the infringement can always be treated as a mitigating factor, although greater weight shall be given to termination prior to the launch of an investigation by the NMa. According to rules in Switzerland the termination should take place *“after the first involvement of the CA, at the latest, but before the opening of the procedure”*. In the practice of the European Commission this factor may warrant a reduction of fine in some kind of competition infringements but not in cartel cases.

### 6.2.3 Limited participation

In Russia, Korea, New Zealand, Serbia, Switzerland, Czech Republic, EU and Turkey limited participation in the cartel, or minor role in the offence belong to mitigating circumstances. In Germany, Italy and Hungary, forced participation or a passive role in the infringement is considered as mitigating circumstances, while the Czech response quotes a *“merely passive or limited role”*. Turkey mentions *“pressure 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

The Czech, Serbian, Hungarian and Korean competition authorities take into consideration the state action defence, e.g. improper state regulation, which can lower the final amount of the fine. In its reply Korea refers to *“illegal behaviour motivated by the government”*. The *‘state action’* argument used to be reason for the reduction of the fine in EU as well but the approach predated 2006 Guidelines on Fines.

### 6.2.5 Negligence

Negligence does not seem to be 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. On this basis any reduction may be obtained only in the Czech Republic and Serbia. The EU’s reply also mentions this possibility but adds that – although the 2006 guidelines mention this element – in practice its application is unlikely.

### 6.2.6 Others

The replies reveal several other mitigating circumstances.

Early admission of liability may qualify for reduction of the fine in New Zealand and Turkey. The same approach is applied in US, where clear recognition and affirmative acceptance of responsibility for its criminal conduct is recognised as a mitigating factor. In Canada the *“acceptance of responsibility”* may decrease the final amount of the fine.

The size of the firm is considered by the Japanese competition authority. SMEs (defined on the basis of amount of capital or the number of the employees) may count on lower fines. The same aspect is mentioned by the

Turkish reply as well. In the US, the size of the organization is also taken into account in calculating a corporation's fine range.

The existence of antitrust compliance programmes may also result in decrease of the fine in New Zealand and Korea.

"Restitution to victims" in Canada, compensation in the Netherlands and measures aiming at reducing the anti-competitive impact in Italy are considered as attenuating factors.

The Swiss competition authority considers if the offender did not carry out measures of retaliation for the implementation of the anti-competitive agreement.

Little significance may also merit a decrease of the fine under the Russian system.

Several factors of economic nature are mentioned by the Turkish competition authority (e.g. small relevant market, the small size of the turnover affected by the violation, vertical-type violation, etc.).

### **6.3 Mitigating elements versus leniency**

Most of those CAs that have a leniency programme<sup>43</sup> and answered the relevant question<sup>44</sup> (EU, Czech Republic, Hungary, and Korea) noted that leniency rebates apply to the amount of the fine which would have otherwise been applicable. This approach implies that leniency and other mitigating factors can be applied cumulatively.

In the Netherlands, the circumstance that an offender has provided extensive cooperation in the NMA's investigation beyond his legal obligation to do so is not taken into account as a mitigating factor if the offender participates successfully in the Leniency programme.

### **6.4 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 is 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.

Inability to pay as a circumstance to be considered in imposing the fine is taken into account by most competition authorities. Only four of them (Jordan, Mexico, Netherlands and Hungary) indicated that they have no possibility to take this factor into account. However it must be emphasized that two of these competition authorities can indirectly consider the financial status (Mexico) or the risk of bankruptcy (the Netherlands).

In the case of authorities which may take into account the ability to pay, there is significant difference in the way 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 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. According to this principle the authority must take into account the financial standing of the enterprise. The Competition Board of Turkey seems to apply the principle of proportionality combined with the economic approach stating that the imposition of severe sanctions on small undertakings would put them in a disadvantageous position against larger ones, including in case where the fine is imposed on an association, whose members have to pay the fine.

<sup>43</sup> Turkey does not have a leniency programme.

<sup>44</sup> Austria, Brazil, Germany, Italy, Jordan, Mexico, Russia, Serbia, Switzerland, and USA did not seem to answer this question.

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 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.

The EU 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 irreparably 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. The same is true for the Czech Republic where only in exceptional cases the Office may take into account the undertaking's inability to pay. A reduction could be granted solely on the basis of objective evidence that the imposition of the full fine would irreparably jeopardize the economic viability of the undertaking.

According to German legislation if an undertaking proves that it is unable to pay the fine in the short or medium term without jeopardizing its existence the Bundeskartellamt can issue a debtor warrant or allow payment of the fine to be deferred. A reduction of the fine will, however, only be considered in exceptional cases if a company proves that, even on a long-term basis, it would be unable to pay the fine without jeopardizing its existence. The Hungarian authority has the right to allow instalment payments upon the request of parties.

The New Zealand's courts have also outlined that the inability of the defendant to pay is a relevant factor to be taken into account in determining the fine. However, the court also noted that there is authority for the proposition that the quantum of penalties imposed for anticompetitive behaviour, may in egregious circumstances, be such that payment may put the defendant out of business.

In Canada, where an accused party can establish to the satisfaction of the Competition Bureau and the Public Prosecutor that it is not in a financial position to pay a fine, the Bureau may make a recommendation for a fine reduction; an extended payment period or even a final disposition that does not include a fine may be justified on ability to pay grounds.

In Korea, the KFTC considers the company's financial condition and if it is not able to cover the fines, these can be mitigated.

The replies of Serbia, Ireland, Russia, Brazil and Austria 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.

Chart A: Aggravating factors

Country	Duration <sup>45</sup>	Recidivism	Role in offence	Refusal of cooperation	Obstruction	Others
Austria		Yes		Yes		Yes
Brazil		Yes	Yes			Yes
Canada	Yes	Yes	Yes		Yes	Yes
Czech Republic		Yes	Yes	Yes	Yes	
European Union		Yes	Yes	Yes	Yes	
France		Yes	Yes			
Germany		Yes	Yes			
Hungary		Yes	BA <sup>46</sup>	PF <sup>47</sup>	PF	
Ireland				PF	PF	
Italy		Yes	Yes		Yes	Yes
Japan		Yes				
Jordan		Yes		Yes	Yes	
Korea	Yes	Yes	Yes	Yes	Yes	Yes
Mexico	Yes	Yes	Yes			Yes
Netherlands		Yes	Yes		Yes	Yes
New Zealand		Yes	Yes	Yes	Yes	Yes
Norway						
Russia		Yes	Yes	Yes	Yes	Yes
Serbia	Yes	Yes	Yes	Yes		
Switzerland		Yes	Yes	Yes	Yes	
Turkey	Yes	Yes	Yes	Yes	Yes	Yes
USA		Yes			Yes	Yes

<sup>45</sup> Only if duration is not considered in the basic amount of the fine.

<sup>46</sup> “BA” indicates when the factor is considered at the calculation of the basic amount of the fine.

<sup>47</sup> “PF” indicates when the factor does not necessarily affect the amount of the fine, but a separate procedural fine may be imposed.

**Chart B: Mitigating factors**

Country	Negligence	Immediate termination	State action defence	Effective cooperation	Limited participation	Antitrust compliance programme	Others
Austria	Yes			Yes			
Brazil							
Canada				Yes			Yes
Czech Republic	Yes	Yes	Yes	Yes	Yes		
European Union	Yes <sup>48</sup>		Yes	Yes <sup>49</sup>	Yes		
France				Yes <sup>50</sup>		Yes <sup>51</sup>	
Germany			Yes				Yes
Hungary		Yes	Yes	Yes	Yes		
Ireland							
Italy		Yes		Yes	Yes		Yes
Japan		Yes					Yes
Jordan							
Korea		Yes	Yes	Yes	Yes	Yes	
Mexico							Yes
Netherlands		Yes		Yes			Yes
New Zealand				Yes	Yes	Yes	Yes
Norway							
Russia		Yes		Yes	Yes		Yes
Serbia	Yes	Yes	Yes	Yes	Yes		
Switzerland		Yes		Yes	Yes		Yes
Turkey		Yes		Yes	Yes		Yes
USA				Yes	Yes		Yes <sup>52</sup>

<sup>48</sup> Not really applied in practice.

<sup>49</sup> This aspect is considered mainly in the context of the leniency policy. In cases where undertakings do not qualify for the purposes of the Leniency Notice, a reduction of the fine in consideration of the undertaking's cooperation beyond its legal obligations is unlikely and granted only under exceptional circumstances.

<sup>50</sup> Similar approach as the one of the European Commission above.

<sup>51</sup> In the context of settlements.

<sup>52</sup> While the US Sentencing Guidelines provide for a possible reduction in an organization's fine for having in place an effective ethics and compliance programme, this provision has never been successfully utilized by a corporate defendant charged with federal antitrust offence.





## 7. LIMITS (MAXIMA AND MINIMA)

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

Few of the 22 responding competition agencies have both minimum and maximum statutory limits. Only the 6 following countries have both maximal and minimal statutory limits: Brazil, Germany, Japan, Jordan, Russia and Serbia.

#### 7.1.1 *Maximum limits*

##### a) Fines for involvement in a cartel

The legislative frameworks of all the responding competition authorities provides for a maximum amount of fines against undertakings and a vast majority also have a fining policy against 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\$10 million; Japan: 500 million yen or Mexico: 1 500 000 times the general minimum wage in the Federal District).

Secondly, it may be set a percentage of turnover or similar measure: Norway, European Commission and a significant number of EU member countries such as Austria, Hungary and Italy for example: 10% of the firm's worldwide turnover during the last financial year; Brazil: 30% of the gross revenue of the last financial year; Serbia: 10% of the total annual income realized in the preceding year; 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 when it cannot be calculated, annual gross revenue generated by the end of the financial year that is closest to the date of the final decision).

When referring to turnover the vast majority of the considered countries 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 country)<sup>53</sup>. The US will normally use only the volume of US commerce affected by the defendant's participation in an international cartel when calculating that defendant's fine range under the U.S. Sentencing Guidelines. If, however, the amount of US commerce affected by a defendant in an international cartel understates the seriousness of the defendant's role in the offence, the defendant's worldwide sales may be considered when determining a fine range under the U.S. Sentencing Guidelines.

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.

Thirdly, several countries choose to refer to the value of cartelised sales in the market concerned. Jordan uses 5% of the value of sales or revenue from services of the violator, Russia uses 1/15th of the violator's proceeds of the sales of goods (works or services) in the market where the infringement occurred.

Fourthly, a few countries use the profits gained from the infringement or losses caused to the victims. In the USA the maximum fine for a corporation is the greatest of \$100 million USD or twice the pecuniary gains the conspirators derived from the crime or twice the gross pecuniary loss caused to the victims of the crime. In New Zealand this maximum can go as high as three times the value of the commercial gain resulting from the contravention.

<sup>53</sup> On the notion of global/relevant turnover and consequences, see points 3.1 and 4.1 above.

In some jurisdictions, the statutory limits of the fine may be a combination of two or more of the above described concepts. In France, for example, a maximum monetary amount of €750 000 (only applicable for simplified procedure) is combined with the maximum 10% of the undertaking's worldwide turnover in the preceding year. In Germany the combination is €100 000 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. In Jordan it is 5% of the total annual value of sales or revenue from services of the violator or 50 000 dinars if the value of sales or revenues cannot be used.

Where alternative systems exist the greater amount generally applies (Czech Republic: 10% of the net turnover achieved in the last expired accounting period or up to CZK 10 000 000, in Ireland the greater of €4 million or 10% of turnover in the year prior to the imposition of the sentence, in the Netherlands the greater of €450 000 or 10% of turnover of the undertaking in the financial year preceding the decision). A third criterion comes into play in some jurisdictions. In New Zealand the greater of \$100 000 000 or 3 times the value of the commercial gain or 10% of the total gross revenues as a result of a trading within New Zealand applies. In the USA 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 the greater.

### ***Fines against individuals***

Some responding countries only apply fines to undertakings. This is the case for Austria, Czech Republic, the European Commission, Hungary, Italy, Jordan, The Netherlands, Norway and Serbia.

Where fines can be imposed on individuals, the amount of the pecuniary sanction can vary between 10 and 15% of the fine imposed on their undertaking (Brazil) or it can be the same maximum amount as the one applying to the undertakings (Canada: Can\$10 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; Mexico: 30 000 times the general minimum wage in the Federal District; New Zealand: \$500 000; Switzerland: administrative sanctions: €60 718).

In France and in Japan the law determines the maximum amount of fine imposed on individuals only when this fine has a criminal nature (France: €75 000; Japan: YEN 5 million).

In two responding countries, as is the case for undertakings, alternatives apply to fines imposed on individuals: in Russia: 20 000 rub. (approx. €565) or 1/25 the size of all the proceeds of the sales of goods for the calendar year preceding the year when the violation was revealed. In the USA, \$1 000 000, twice the gross pecuniary gain or twice the gross pecuniary loss to the victims.

#### **b) Procedural fines**

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

Some of them are criminal (Canada, Ireland) but a vast majority are administrative sanctions.

All the responding countries 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's request: this is the case in Brazil where a maximum daily fine of 5.000 UFIRs (around R\$ 5 000) may be imposed and can be increased up to 20 fold according to the financial status of the perpetrator (this daily fine cannot exceed 90 days); in the Czech Republic, the maximum fine will be an amount of CZK 300 000 or up to 1% of the net turnover achieved by the undertaking in the last accounting period, in Norway, the maximum fine is 1% of the undertaking's worldwide turnover; in Turkey, the Competition Board may impose a fine equal one thousandth of the annual gross revenue of the undertaking or association of undertakings or the members of such association;

- obstruction to proceedings and failure to comply with an order or a warrant: in Brazil, any hindrance to inspections is subject to maximum fines of R\$ 425 700; in Canada: the fine may be up to \$5 000 and/or the imprisonment shall not exceed 2 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 records and seals broken on business premises set up in connection with dawn raids: in Canada, on summary conviction, the fine may be up to \$25 000 and/or the imprisonment shall not exceed 2 years whereas on conviction on indictment, the maximum fine would be up to \$50 000 and/or the imprisonment shall not exceed 5 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 Czech Republic, the fine will be a maximum of CZK 100 000; 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 twenty fold according to the financial status of the offender; in Czech Republic, the undertaking concerned may be fined up to CZK 10 000 000 or up to 10% of the net turnover achieved in the last period; in Turkey, the Competition Board may impose fines on undertakings and associations of undertakings per day which amounts to five per ten thousand of the annual gross revenue of the undertakings, and of associations of undertakings and/or the members thereof. In Switzerland, without distinguishing the type of the procedural breach, non-compliance with procedural obligations lead to administrative penalties of up to €60 718.

In the EU, procedural fines (for providing incorrect or misleading information or for breaching seals for example) 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 Commission's decision (for example a decision compelling an undertaking to end an infringement, to supply information or to submit to an inspection). 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

In most cases, there are no minimum limits but when there is one provided by the legislation, it is generally 1% of the relevant amount, as in Brazil, Serbia, Russia, Jordan, and Czech Republic.

In the latter case there is an alternative between a fixed amount and a percentage. 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 50 000 Hungarian forint.

## 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, countries like Brazil, Canada, France, Hungary, Ireland, Japan, Korea and the USA have a jail sentencing regime. Generally, the maximum time of imprisonment is five years, such as in Brazil, Canada, Hungary and Ireland. Four exceptions are France, Japan, Korea and the USA, where a maximum jail sentence can be up to 4 years in France, 3 years in Japan and Korea and 10 years in the USA.

On the other hand, few countries have a disqualification system whereby individuals who have been found guilty of participating to a cartel may be temporarily excluded from management of any body corporate. This is the case in New Zealand and Russia whereby maximum disqualifications may be up to respectively 5 or 3 years. Competition law in New Zealand also states that a body corporate must not indemnify a director, servant or agent of the body corporate or an interconnected body in respect of liability for payment of a pecuniary penalty for cartel conduct or for costs incurred by this person in defending or settling any proceeding relating to that liability.

In addition, Brazil provides for a wider range of other sanctions in case of cartels. These sanctions include (i) a half-page publication of the summary sentence in a court-appointed newspaper from 1 to 3 consecutive weeks (this is also the case in France), (ii) a maximum of 5 years ineligibility for official financing or participating in bidding processes involving authorities, (iii) inclusion of the violation to the Brazilian 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 instalment or order the total or partial cancellation of tax incentives or public subsidies, or (v) the company's spin-off, transfer of corporate control, sale of assets, partial discontinuance of activities or any other measure required to cease harmful effects on competition.

New Zealand also provide for remedial and mitigation measures like (i) cease and desist order restraining conduct for any period and on any terms specified in the order, (ii) injunction restraining a person from engaging in conduct that (would) constitute(s) a contravention (iii) any orders including cancelling the terms of contracts that contravene Competition law.

In Hungary, according to the Act on Public Procurement the contracting entity may prescribe in the tender notice that a bidding company may be excluded from participation in the procurement procedure if it has been found guilty and sanctioned within the preceding five years of a legal offence committed in a public award procedure by final and executable decision of the competition authority. Moreover, Hungary has a special type of fines for the effective enforcement of the decisions of the competition authority. The latter 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 (Euro 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 fines ever imposed on a single company**

The EU and USA economic blocks have imposed comparatively high fines: €480 000 000 by the European Commission against Thyssen Krupp and \$500 000 000 by the USA against F. Hoffmann-La Roche.

Of the European countries (EU+EFTA) which have provided data on this matter, Switzerland and France have imposed similar maximum fines (approx. €200 000 000 for Switzerland and €256 000 000 for France), and the other countries (Czech Republic, Hungary and the Netherlands) have fined between €5 000 000 and €21 000 000.

Brazil's maximum fine ever imposed was in the steel rod market and amounted to approximately US\$ 200 000 000 while Mexico has fined a maximum of 36 000 000 pesos (approx. US\$ 3 300 000).

In the Asia-Pacific zone, Japan imposed a confirmed maximum surcharge of 2 400 million Yens (approx. US\$ 22 500 000), Korea 113 billion Won (approx. US\$ 120 000 000) and New Zealand NZ\$ 3 600 000 (approx. US\$ 3 000 000).

Jordan, Russia and Serbia have not imposed fines as yet.

	MINIMUM	MAXIMUM	HIGHEST FINE EVER IMPOSED ON A SINGLE COMPANY
<b>AUSTRIA</b>	no	<i>Administrative sanctions:</i> 10% of the worldwide turnover of the undertaking of the last fiscal year	
<b>BRAZIL</b>	1% The fine must not be lower than the advantage obtained from the underlying violation.	<i>Administrative sanctions:</i> <i>Undertakings:</i> 30% of the gross revenue of the last financial year <i>Managers:</i> between 10 to 15% of the fine imposed on their company <i>Other individuals or other public or private legal entities:</i> between 6 000 to 6 000 000 UFIR or the equivalent in any other index which replaces it. <i>Criminal sanctions:</i> <i>Individuals:</i> 5 years of imprisonment	Approx. US\$ 128 000 000
<b>CANADA</b>	no	<i>Criminal sanctions:</i> <i>Undertakings and individuals:</i> \$10 million Can. <i>Individuals:</i> 5 years of imprisonment	<i>Domestic Case:</i> \$12.5 million Can. (2 counts), <i>International Case:</i> \$48 million Can (on a total of 7 counts)
<b>CZECH REPUBLIC</b>	no	<i>Administrative sanctions:</i> 10% of the net turnover achieved in the last expired accounting period or up to CZK 10 000 000	Siemens AG: 126 588 000 CZK (cartel of producers of gas-insulated switching mechanism – GIS)
<b>EUROPEAN COMMISSION</b>	no	<i>Administrative sanctions:</i> 10% of the undertaking's world wide <u>total</u> turnover (i.e. not limited to the cartelised market) in the preceding financial year	€479 669 850 (imposed on Thyssen Krupp – elevators and escalators case)
<b>FRANCE</b>	no	<i>Administrative sanctions:</i> <i>Undertakings:</i> 10% of the undertaking's world wide <u>total</u> turnover (i.e. not limited to the cartelised market) in the preceding financial year Or €750 000 in case of simplified procedure <i>Criminal sanctions:</i> <i>Individuals:</i> €75 000 and/or 4 years imprisonment	€256 millions (mobile operators cartel)
<b>GERMANY</b>	<i>Individuals and undertakings:</i> €5	<i>Administrative sanctions:</i> <i>Undertakings:</i> €100 000 or 10% of the total turnover of the preceding business year (under Art. 81 EC) <i>Individuals:</i> €1 million	

	MINIMUM	MAXIMUM	HIGHEST FINE EVER IMPOSED ON A SINGLE COMPANY
HUNGARY	no	<i>Administrative sanctions:</i> 10% of the net turnover of the undertaking <i>Criminal sanctions:</i> <i>Individuals:</i> 5 years of imprisonment	5 319 000 000 HUF (€21 276 000 )
IRELAND	no	<i>Criminal sanctions:</i> <i>Undertakings:</i> greater of €4 million or 10% of turnover in the year prior to the imposition of the sentence <i>For individuals:</i> an individual may receive a similar fine and/or a term of imprisonment not exceeding five years	€15 000 in the heating cartel case doubled to €30 000
ITALY	no	<i>Administrative sanctions:</i> 10% of the firm's worldwide turnover during the last financial year	ENI: €117 million in the jet fuel case
JAPAN	<i>Administrative sanctions (surcharges):</i> 1 million yen <i>Criminal sanctions (fines): for individuals and undertakings</i> 10 000 yen	<i>Administrative sanctions (surcharges):</i> 10% of the sales amount of the relevant goods or services <i>Criminal sanctions:</i> <i>For individuals:</i> 3 years of imprisonment and/or 5 million yen of criminal fine <i>For undertakings:</i> 500 million yen of criminal fine	<i>Administrative sanctions (surcharges):</i> 2 400 million yen <i>Criminal sanctions (fines):</i> 640 million yen (as of July 2007)
JORDAN	- 1% of the total annual value of sales or revenue from services of the violator or - 1000 dinars if the value of sales or revenues is not specified	<i>Criminal sanctions:</i> - 5% of the total annual value of sales or revenue from services of the violator or - 50 000 dinars if the value of sales or revenues is not specified	No fines imposed yet
KOREA	no	<i>Administrative sanctions</i> Surcharges: 10% of the average turnover for the previous 3 years or 2000 million won if no turnover <i>Criminal sanctions:</i> - 3 years imprisonment or - 200 million won	113 billion won against KT Corp (2005)
MEXICO	no	<i>Administrative sanctions:</i> <i>For undertakings:</i> 1 500 000 times the general minimum wage in the Federal District <i>For individuals:</i> 30 000 times the general minimum wage in the Federal District	\$36 881 250 pesos mexicanos (2002)

	MINIMUM	MAXIMUM	HIGHEST FINE EVER IMPOSED ON A SINGLE COMPANY
NETHERLANDS	no	<u>Administrative sanctions:</u> €450 000 or if it is greater: 10% of turnover of the undertaking or combined turnover of the undertakings in the financial year preceding the decision; €450 000 for giving instructions or exercising <i>de facto</i> leadership	€14,8 millions against T-Mobile (under legal review); €3,5 million in the SEP case (irreversible)
NEW ZEALAND	no	<u>Administrative sanctions:</u> <i>For individuals:</i> NZ\$500 000 <i>For undertakings:</i> greater of \$10 000 000 or either 3 times the value of the commercial gain or 10% of the total gross revenues received or receivable as a result of a trading within NZ	NZ \$ 100 000
NORWAY	no	<u>Administrative sanctions:</u> 10% of the worldwide turnover of the last fiscal year	
RUSSIA	<i>For undertakings:</i> 1/10 <sup>th</sup> of the violator's gains / the sales of its goods <i>For individuals</i> 17 000 rub. (approx. €480)	<u>Administrative sanctions:</u> <i>For undertakings:</i> 1/15 <sup>th</sup> of the violator's proceeds of the sales of goods (works or services) in the market where the infringement occurred <i>For individuals:</i> 20 000 rub. (approx. €565) or 1/25 the size of all the proceeds of the sales of goods for the calendar year preceding the year when the violation was revealed or for the part of the calendar year preceding the date of revealing the violation, if a violator did not carry out any activity on the sales of goods in the preceding calendar year	No fines imposed yet
SERBIA	1% of the total annual income realized in the preceding year	<u>Administrative sanctions:</u> 10% of the total annual income realized in the preceding year	No fines imposed yet
SWITZERLAND	no	10% of the turnover achieved by the enterprise in the last three business years in Switzerland  <u>Pure administrative sanctions:</u> €60 718.	

	MINIMUM	MAXIMUM	HIGHEST FINE EVER IMPOSED ON A SINGLE COMPANY
TURKEY	no	<i>Administrative sanctions:</i> 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 the 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)	Approx. US\$ 17 million against one of the biggest GSM operators
USA	no	<i>Criminal sanctions:</i> <i>For undertakings:</i> the greater 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 <i>For individuals:</i> the greater of: - \$1 000 000 or twice the gross pecuniary gain or twice the gross pecuniary loss of the victims, 10 years of imprisonment	F. Hoffmann-La Roche: Sherman Antitrust Act, \$500 million, in the vitamin cartel (1999)



## 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<sup>54</sup>.

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. They have also been able to create a significant fear of detection among cartel participants through the use of their investigative powers. Finally, they have been able to put in place effective leniency programmes that contributed to destabilise cartels, increasing further the risk of detection. The combination of these factors has increased the number of investigations carried out by those competition agencies. However the resources constraints faced by competition agencies, make the timely investigation and resolution of cartel cases a bigger and bigger 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 cartel settlement attracts growing interest among competition enforcement agencies.

Six competition agencies which responded to the questionnaire on the setting of fines indicated that in their jurisdiction a form of settlement for cartel cases exists. These are Brazil, Canada, France, New Zealand, Switzerland and the United States. All these jurisdictions have indicated that in their system, it is possible to offer settlements on certain conditions. However not all of them have already applied this instrument. The European Commission has launched a proposal for a settlement procedure, which is likely to enter in force in 2008. The amount of reduction in fines for settlement is not quantified in this proposal.

In Brazil, the amount of the fine to be paid in the context of a settlement must be at least 1% of the gross revenue of the company. There is no maximum determined by the law. The final amount is determined on a case by case basis, taking into account the timing of the cooperation with the competition agency or the adoption of a compliance programme by the company. In Canada, New Zealand and in the USA, plea bargaining is an essential component of the criminal justice system. In Canada, the final discretion as to the sanction imposed rests with the Courts. In New Zealand, to date the Courts have accepted the penalty recommended by the competition agency in every case. The US has the largest number of cases settled in the last 5 years: 207 companies have accepted to settle their cases. Switzerland foresees the possibility of settlements but does not have provisions regarding negotiated settlements in the determination of fines.

### 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 of settlement. Certainly, this is not the only benefit as a settlement system may also involve for companies lower procedural costs or a shorter reputation damage for being named and shamed as a cartel participant. However, discussions with the business community show that the reduction of the fine 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 possible extent, the elements it would take 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 manoeuvre for providing settlement incentives sufficiently attractive beyond those that can be provided under the leniency programme is rather limited. As identified in the ICN Cartel settlement paper, this concern may be addressed by cumulatively or separately seeking to increase the level of sanctions and introducing other types of non-

<sup>54</sup> 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. In addition to the eight jurisdictions that replied to the questionnaire on Cartel settlement indicating that such instrument is currently available for them, New Zealand also replied to question 11 of the questionnaire on the setting of fines, indicating that agreed penalties recommendations are possible in their jurisdiction.

monetary incentives. The same measures would also increase the efficiency of leniency programmes. 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 programme.

A further aspect for reflection is whether the reduction in fines for settlement should be the same for all 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 they can also reward a number of subsequent successful applicants that decide to cooperate.

In jurisdictions such as Canada or the US, cartel settlements can be seen as an investigative tool, whose objective is to obtain the cooperation of companies that can no longer benefit from immunity. Settlements can be considered as equivalent, from an operational point of view, to the reductions in fines that other jurisdictions offer to successful leniency applicants after the first. The overall reduction of the fines should therefore also reflect the degree of cooperation offered by the cartel 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 EU proposal for administrative settlement, 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 who 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 that would just wait and see. The proposal of the European Commission is to offer 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. In addition, this ensures, in combination with the fact that the 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 of fines. It also prevents that the entire process is held hostage by the last company(ies) if the last companies to settle are better treated than the first.

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

In the jurisdictions that have some type of leniency programme, a majority of the investigations start on the basis of an amnesty/immunity application. Following the first investigative measures launched by the competition agency, a number of other cartel participants would 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 that provided for under the leniency programme, 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 programme, cartel participants would refrain to apply 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 be always in time to 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 cartel should be found and sanctioned.

## **8.3 Interplay of settlement and deterrence**

As already mentioned in Chapter 2, the 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.

Although the experience that ICN jurisdictions have developed so far in the field of settlements is still limited to a handful of jurisdictions, the ICN members with a settlement system in place that participated in the ICN Cartel settlement paper agree nevertheless that the benefits gained from settlements outweigh the additional charges or penalties that might have been obtained in the absence of a settlement system. 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 adequately reflect 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 recalled that, as already mentioned above, one of the advantages of settlement procedures is also to save human and financial resources that would have 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 hardcore cartels than for other infringements of competition law, reflecting the consensus that hardcore cartels are the most pernicious 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 as record by the companies.

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

In the majority of jurisdictions that provide for sanctions on individuals involved in cartel activity, fines imposed on individuals are statutorily capped at a lower level than for companies, often at a fixed figure. However, in some jurisdictions the fines are a proportion of the fines imposed on the companies, and therefore related to 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 party involved in 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 certain 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** 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. Fines can also be reduced for companies that co-operate or settle their cases with the competent prosecuting agencies.

- 9.2.5 The inability of a company to pay a fine appears to be a factor that is generally considered in all jurisdictions, either explicitly or implicitly. In certain jurisdictions it is based on the consideration that the fine cannot be as 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 Recent evolution**

- 9.3.1 It appears that in many jurisdictions the level of fines has been significantly increasing over recent years. In certain jurisdictions, there seems to have been an evolution from fining systems based on fixed amounts (for instance linked to the gravity of the conduct) to systems based on a percentage of turnover/volume of commerce/affected sales.
- 9.3.2 Apart from the general principle according to which 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, a certain degree of transparency with regard to the determination of fines appears to be required also with the view of providing the appropriate incentives for companies to co-operate or settle with the authorities.

## **ANNEX 1. ICN QUESTIONNAIRE ON FINES AND FINING METHODOLOGIES IN CARTEL CASES**

### **A. Introduction**

On the basis of the ICN Work plan 2007-2008, the General Legal Framework Subgroup will conduct two projects a) Negotiated settlements and b) Determining fines.

The aim of the latter project is to elaborate a conceptual framework on the methodologies of fine determination in the various jurisdictions that will participate in filling this questionnaire. The information gathered with the questionnaire will help identifying the main approaches used in fine determination imposed on hardcore cartels participants. The focus of the project is fines, although other types of sanctions are touched upon in the questionnaire.

A summary of the ICN members' replies to the questionnaire will be presented in a report, which will analyse the identified issues and outline the major approaches to fines determination.

The report will be presented at the next ICN annual conference in Kyoto, Japan, in April 2008.

### **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 sanctions in cartel cases in your jurisdiction: are they civil, administrative, criminal, other, combined? (NB: issue also covered by question B, section 11 of cartel template)
5. In relation to your answer to question B.4, can other types of sanctions, in addition to fines and other pecuniary sanctions be imposed? (NB: issue also covered by question B, section 11 of cartel template)
6. In this case, does your CA or any other institution have the choice on the type and nature of the sanctions to be imposed?
7. Please also specify whether fines or other pecuniary sanctions are imposed on: (NB: issue also covered by question C, section 11 of cartel template)
  - specific companies?
  - groups of companies (i.e. the company which committed the infringement and their parent companies)?
  - specific individuals who committed the infringement?
  - a combination of any of the above?
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 E, section 11 of cartel template)
9. What is the limitation period (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 9 of cartel template)

10. What is the objective of fines in your jurisdiction is it (NB: issue also covered in part by question D, section 11 of cartel template)
- deterring the sanctioned companies or individuals to repeat the same conduct in the future?
  - deterring other companies or individuals to start 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)?
  - another one?
  - a combination of any of the above?
- Please indicate your objective by underlining the appropriate reply.
11. What is the maximum amount of fines that have been imposed in your jurisdiction on a single company/legal entity/economic entity (choose whatever is the more appropriate definition in your jurisdiction)?

### **C. Determination of fines**

1. In your jurisdiction, are fines related in any way to:
- the nature of the infringing conduct;
  - the gravity of the infringing conduct;
  - other factors?
- Please also define the meaning of these concepts in your jurisdiction.
2. In your jurisdiction, are fines related to:
- the global turnover of the firm/undertaking (whatever is appropriate);
  - the value of sales/volume of commerce on the relevant market concerned by the infringement;
  - the additional profit made through the infringement;
  - the consumer losses due to the infringement;
  - the total loss of economic welfare;
  - other?
3. If you replied to question B.2, is the relationship between the fine and the answer to question B.2:
- a fixed amount,
  - a percentage
  - or takes another form?
4. If the basis for the determination of fines is a proportion of the company's sales, are these sales direct sales only or indirect as well? In this context, indirect sales mean that the cartel member also transforms the cartelised product and sells the transformed product (even not cartelised). For example, a producer of wood pulp that sells also paper: is the value of wood pulp contained in the sales of paper taken into account?
- Similarly, if a company (A) sells the cartelised product to another company (B) in the same group which in turn sells it on the market, are these sales (of B) taken into account for the determination of the fines?
6. Please explain how, in your jurisdiction, the duration of a cartel has an impact on the determination of fines?
7. In the determination of fines are the following possibly "aggravating" factors/circumstances taken into account? (please underline the relevant factors):
- recidivism,
  - role in the offence, being an instigator/leader/organiser of the conduct,
  - refusal of co-operation,
  - obstruction,
  - others, namely: ...
- Please elaborate, how do these factors modify the determination of the fine?
8. In the determination of fines are the following possibly "mitigating" factors/circumstances taken into account? (please underline the relevant factors):
- negligence (for example, insufficient control on the conduct of rogue employees),



- immediate termination of the infringement,
- short duration,
- state action defence,
- effective co-operation with the competition authority during the investigation,
- limited participation/minor role in the offence,
- company's antitrust compliance program,
- others, namely: ...

Please elaborate, how do these factors modify the fine determination?

9. In addition to the factors mentioned in question C.7, are there in your jurisdiction factors that can result in an increase of the fine for policy reasons, for example higher deterrence?
10. If you have a Leniency programme 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.8)?
11. If negotiated/direct settlements with cartel participants are possible in your jurisdiction, explain their role in the determination of fines?
12. 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?
13. Is the inability of an undertaking to pay the fine taken into consideration in your jurisdiction? If so, in which way?
14. 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.

#### **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)?

European Commission

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