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International Report

Question A: Fines in Antitrust

What are the most important factors that should determine the level of fines imposed for infringements of competition rules? Should there be a binding framework determining the level of fines? Who should decide? Etc.

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A. INTRODUCTION

A.1. General

It is the purpose of the report to analyse and compare the approach of the various national jurisdictions in their fine procedure, and to identify

- the most important factors (e.g. cooperation, compliance programmes, impact of the infringement, previous infringements and/or deterrence etc) determining the level of fines imposed for infringements of the competition rules,
- the importance of a binding framework determining the level of fine and
- the best placed body to decide e.g. judges, competition authorities, ministers and /or some other independent body.

For this purpose, the International Report will first focus on the following issues:

- **Chapter B** (Legal framework and the relevant institutions)

In this regard, this chapter shall I give an up-dated overview of the current common "status quo" based on the national reports covered. . References will be also made to EU legislation, case-law and Commission's practice.

- **Chapter C** (Normative questions and recommendations)

The chapter concerning "normative questions" will focus on the views taken by the national rapporteurs on essential questions of fining regulations such as "determination of the amount", "human rights standards" etc

- **Chapter D** (Statistical data with regard to amount of fine in the jurisdictions covered)

The data given contains a detailed evaluation of fining level of the various jurisdictions further broken down into different infringements of competition law (such as abuse of dominance, cartels etc) as available.

The Chapters are structured as follows: After an introduction into the subject, the International Report will summarize the National Reports. Common approaches will be highlighted and individual national concepts will be illustrated.

A.2. Conclusions

On the basis of the national reports the following conclusions are submitted for discussion by the Scientific Committee and the LIDC Congress. The following conclusions are submitted for discussion.

The League recognizes the importance of entrusting competition authorities with a certain degree of discretion in applying fines for competition law infringements. However, the League also underlines the importance of adequate controls on the exercise of this power and of consistency. The League makes the following recommendations:

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The level of fines imposed for infringements of the competition rules should be based on the following factors:

- Competition law fines should primarily be aimed at achieving a **specific and general deterrent effect** in order to sanction the undertaking involved and to deter other undertakings from future infringements;

- With a view to this, the **seriousness of the infringement** (e.g. price-fixing, market-sharing and output-limitation agreements) should be one of the factors taken into account. In defining seriousness reference should be also made to general legal terms and concepts in the respective jurisdictions.

- Fault (i.e. the extent to which the responsible officers within the undertaking knew or should have known that the conduct was illegal or anti-competitive) should also be taken into account when determining whether a fine should be imposed.

- Based on general principles of criminal law, lack of effects should be assessed as a strong mitigating factor.

- In line with the above, the **size of the undertaking** involved should be one of the essential factors in determining the amount of the fine. In this regard, the turnover, at least within the market affected by the infringement, is an accepted starting point. However, adjustments may be necessary in cases where turnover does not provide an economically realistic measure of the true size of an undertaking.

In addition, **the League recommends that** competition authorities should be empowered (and required, if to the benefit of the undertakings concerned) to take account of a number of additional factors:

- **Cooperation with the authorities (outside leniency**) should not be reflected in the amount of the fine except where it goes beyond compliance with legal obligations placed on the undertaking (for example, to produce documents or to provide information).

- **Compliance programs** initiated after (disclosure of) the infringement should not be acknowledged as a mitigating factor; However, compliance programs created before the infringement and showing the undertakings true and intense efforts to avoid infringements (e.g., reflected by the extensiveness of the programme) can be taken into account as a mitigating factor.

- A **failing firm defence** should be admitted within strict limits as a factor which could reduce the fine.

- **Recidivism** should be taken into account;;

- Strict and transparent periods of limitation should be applied.

- The **market shares** of the undertakings concerned and the **geographic scope** of the infringement should be (indirectly) reflected by taking the undertaking's turnover as the basic amount of the fine: but those factors as such should not be taken additionally as aggravating circumstances.

Concerning the concept of a binding framework determining the level of fine and the question who should decide the framework the following conclusions can be drawn, the League recommends:

- **Statutory law** should determine the level / maximum amount of fine. Furthermore, as simply prescribing a maximum penalty leaves too much discretion in the hands of NCAs and /or courts, statutory law should also define the basic principles with regard to the factors taken into account when imposing a fine.

- **Guidelines** issued by (administrative) national competition authorities should be published to ensure in detail the transparency of the methodology of setting fines. In order to react to current legal developments, the NCAs should be free to adjust the guidelines concerning infringements in future. The guidelines should be binding on the NCA, save in exceptional cases (in which the NCA should be required to explain why the case is exceptional). The guidelines should not bind the court to which any appeal against a fining decision is brought.

- As regards the **authority competent to impose a fine**, legal systems should provide for appropriate checks and balances. If a system does not opt for a strict separation of powers (i.e., separation of the accuser and the judicial body deciding on the fine), at least case handler / teams should operate in entirely separated teams within the authority ("firewalls" between teams of investigation and decision).

A.3. National Reports

The international rapporteur would like to thank the national rapporteurs for their high-quality work. It is highly recommended to go through the reports (which are published on the website of LIDC), especially if there are questions with regard to specific issues. The detailed variety and the efforts taken in the preparation of the answers are simply outstanding.

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A.4. National Competition Authorities

In the international report, reference is made to the respective national competition authorities, which are generally abbreviated with „**NCA**". The following table lists the names of the respective national competition authorities.

country	**institution**
Austria	**Federal Competition Authority** (Bundeswettbewerbsbehörde)
Belgium	**Belgian Competition Authority** (Belgische mededingingsautoriteit / Autorité belge de concurrence)
Brazil	**Administrative Council of Economic Defense** (Conselho Administrativo de Defesa Econômica, "CADE")
Czech Republic	**Czech Office on Protection of Competition** (Úřad pro ochranu hospodářské soutěže)
Denmark	**Danish Competition (and Consumer) Authority** (Konkurrence- og Forbrugerstyrelsen)
France	**Competition Authority** (autorité de la concurrence)
Germany	**Federal cartel office** (Bundeskartellamt)
Hungary	HCA: **Hungarian Competition Authority** (Gazdasági Versenyhivatal)
Italy	IAA: **Italian Antitrust Authority** (AGCM: Autorità Garante della Concorrenza e del Mercato)

Japan	JFTC: **Japan Fair Trade Commission**
Netherlands	DCA: **Dutch Competition Authority** (NMa: Nederlandse Mededingingsautoriteit) Exception telekom sector: OPTA: Dutch Independent Post and Telecommunications Authority
Norway	NCA: **Norwegian Competition Authority** (Konkurransetilsynet)
Sweden	SCA: **Swedish Competition Authority** (Konkurrensverket)
Switzerland	**Competition Commission** (WEKO: Wettbewerbskommission)
UK	**Office of Fair Trading** (OFT)
USA	**Department of Justice** (DOJ) and **Federal Trade Commission** (FTC)

B. LEGAL FRAMEWORK AND RELEVANT INSTITUTIONS

There is a broad consensus these days that antitrust fines have been increasing significantly in recent years,[2] and are high compared to fines for other violations of law. There is also, to the author's knowledge, broad agreement that severe sanctions, such as those imposed for violations of competition law, should be accompanied by certain guarantees of fairness.

These guarantees, which are enshrined in constitutional provisions such as Art 6 of the European Convention of Human Rights ("ECHR") or Art 49 of the Charter of Fundamental Rights of the European Union, relate in particular to the institution deciding on the case (independence and impartiality) and the applicable procedure (rights of defence). They furthermore extend to the relationship between the crime and the punishment, in that they require the sanction to be proportional to the offense committed.

What is less clear is to what extent these guarantees apply to the institutional, procedural and substantive framework governing the imposition of antitrust fines. The most prominent example of this debate is probably the enforcement of competition law by the European Commission – a debate that has gained momentum with the entry into force of the Treaty of Lisbon, which adopted the Charter of Fundamental Rights into EU law and provided for the accession of the EU to the ECHR. Even so, learned commentators still disagree whether EU antitrust fines come within the ambit of the hard core of criminal law[3] or are of a sort not strictly belonging to the traditional categories of criminal law.[4] This difference of opinion has significant consequences – in particular, while hard core criminal cases need to be heard by an independent and impartial tribunal, the European Court of Human Rights has held that "soft criminal" cases may be decided by an administrative authority, provided that the decision can be appealed before a judicial body with full jurisdiction on all matters of facts and law.[5]

Indeed, the guarantees applicable to competition fines may still be evolving. In *Jussila*, the European Court of Human Rights considered that competition law formed part of the "soft" or non-traditional category of criminal law.[6] Furthermore, in the recent *Primagaz* case, the Court considered that a national regime whereby the review of decisions authorising a dawn raid was limited to points of law (excluding an appeal on the facts) was in contravention of Art 6 ECHR.[7] As has been noted in legal writing, the scrutiny required by the Court in the review of

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2 Cf. ICN Cartels Working Group, Setting of Fines for Cartels in ICN Jurisdictions, Report to the 7th ICN Annual Conference, Kyoto, April 2008.

3 See e.g. *Forrester*, A Challenge for Europe's Judges: The Review of Fines in Competition Cases, 36 ELRev (2011), 185.

4 See e.g. *Wils*, The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights, 33 World Competition (2010), 5.

5 ECHR, Judgment of 21 May 2003, *Janosevic v Sweden*, Application no. 34619/97, para 81.

6 ECHR, Judgment of 23 November 2006, *Jussila v Finland*, Application no. 73053/01, para 43, with reference to the European Commission of Human Rights' decision in *Société Stenuit v France*, Application no. 11598/85.

7 ECHR, Judgment of 21 December 2010, *Primagaz v France*, Application no. 29613/08.

an interlocutory step in competition proceedings suggests that the standards applied to the imposition of fines should be intense.[8]

Against this backdrop, the national reports offer valuable insights both into the institutional and procedural guarantees as they are now applied in the reporting countries, and into the adequacy of this state of affairs in the light of international and national guarantees of a constitutional nature.

These issues were assessed in the national reports, and are summarised in this report, in response to a number of detailed questions proposed, in particular, by the Scientific Committee. Indeed, on a closer look, the principles of institutional and procedural fairness give rise to a myriad of questions as regards their application to antitrust enforcement.[9] It is only by looking at these details that commonalities and differences can be identified, and inferences drawn regarding the appropriate legal framework for antitrust fines.

B.1. Institutions

Which bodies are responsible for deciding the amount of the fine imposed for an infringement of competition law ("infringements")? (Please describe hereunder also the degree of independence from other public enforcement bodies and indicate also whether the same body investigates and decides over the fine; please describe whether an appeal is possible and to which body/institution (administrative body, independent tribunal etc..).

Separation of Powers

With regard to the bodies deciding on fines for infringement of competition rules, the differences in national approaches can be assessed on "separation of powers". I.e., the fundamental question is whether NCAs can impose a fine itself or only request it. If the question is to be answered affirmative (i.e., the NCA can decide), it has to be scrutinized whether there is a separation within the NCA between an investigating and deciding case-handler, team or body.

Therefore, first, it has to be differentiated between

- (administrative though independent) NCAs, which can not impose fines, but only investigate and apply for a fine with (specialised or general) courts and
- NCAs, which have the power to investigate and to impose fines.

Based on the national reports received, the majority seems to follow the latter approach (e.g., **France, Germany, Italy, Hungary, Czech Republic, Netherlands, Norway, Japan,**

8 *Forrester*, FN 3 above, (206).

9 See e.g. *Anderson/Cuff*, Cartels in the EU: procedural fairness for defendants and claimants, Annual proceedings of the Fordham Corporate Law Institute 2010, 197.

Switzerland, UK, Belgium), while only in **Austria**, **Denmark**[10] and **Sweden**[11] the NCA cannot impose fines.

With regard to the latter, the respective NCA applies for a fine, while it is up to courts[12] to decide whether and if yes, which amount of fine will be imposed.[13]

Within the authority, the responsible case-handlers / teams can be responsible for both investigation and decision / fining (e.g., **Germany** or **Czech Republic**, where the Decision Divisions are responsible both for the investigation of cases and fining).

Alternatively, e.g., in **Japan** and **Italy**, the persons within the authority who take charge in the investigation are internally separated from the persons who ultimately take the decision. By way of example, the investigation in **France** is carried out by the investigations department of the *Autorité de la concurrence*, while the decision is taken by the authority's *college* in contradictory proceedings. Similarly, in **Switzerland** the Secretariat of the Competition Commission acts as the investigative body and proposes the amounts of fines for infringements to the Competition Commission, which is the responsible body to decide on the amount of fines for infringements.

In **Belgium**, the Auditorat issues a 'reasoned report', and the responsible chamber of the Competition Council will issue a decision. A similar separation in structure applies in the **Netherlands**, where the Competition Department (*Directie Mededinging*) is responsible for the investigation of (potential) infringements and the Legal Department (*Juridische Dienst*) determines whether there is sufficient proof of an infringement and if so, how the infringement should be fined. In **Hungary**, a case handler submits his investigation report and the Competition Council (being the independent decision-making body within the NCA) takes the decision.

Scope of power, proceedings

Within the NCAs with power to impose fines, further distinctions can be made. There are NCAs which can only impose certain fines, e.g., in **Japan** (with regard to administrative fines, but not in relation to criminal fines) or in **Norway** (where authorities cannot rule on individual fines).

Furthermore, NCAs can apply different proceedings, e.g., in **Germany**, with regard to administrative proceedings ("Verwaltungsverfahren") and regulatory offence proceedings

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10 The Danish Competition Authority is competent to propose a fixed-penalty notice in cases involving infringements of the Competition Act, meaning that the case can be closed without trial if the persons/companies, who have committed the infringement, declare themselves to be guilty of the infringement and agree to pay the fixed penalty proposed by the Competition Authority. However, the Public Prosecutor for Serious Economic Crime has to agree.

11 With regard to so called "Fine Orders", the Swedish competition authority may order an undertaking to pay a fine. Preconditions therefore: a) The SCA considers that the material circumstances regarding the infringement of the Act are clear. b) The issuing of a fine order requires the consent of the undertaking(s) subject to the order.

12 Austria: Cartel Court, Sweden: Market Court, Denmark: General Courts.

13 In Austria, the Court cannot impose a fine which is higher than requested by the NCA.

("Ordnungswidrigkeitsverfahren") or in **Sweden** where the authority can settle cases within its "Fine Orders"-proceedings.

Independence of authority

In all jurisdictions covered, the bodies responsible for deciding the amount of the fine imposed for an infringement of competition law, act independently, regardless whether they are (administrative) authorities or courts.

Appeal

Furthermore, all jurisdictions provide for a right of appeal against the amount of fine to an independent judicial tribunal. While it is mostly courts, to which an appeal against the fine imposed is possible (e.g., **Austria**, **Sweden, Germany**[14]), some national legal systems grant a possibility to appeal within the authority as first instance (**Japan**, **Netherlands**) or special tribunals to which application is possible (e.g., **UK**, **Netherlands**).

With regard to courts (of appeal), a distinction can be made between specialized cartel courts (e.g., **Austria**), administrative courts (e.g., **Italy, Czech Republic, Switzerland**), general courts (e.g., **Belgium, Denmark**) or criminal courts (e.g., **Norway**). With regard to the possibility of appeal, see in detail B.5.

Side note EU: *Within the EU, it is the European Commission as an administrative enforcement authority, to impose fines on undertakings which infringe EU competition law. In general, there is no separation between investigation & decision within the structure of the Commission investigation's structure. However, the Commission has introduced internal checks and balances (by means of internal review, eg by the Legal Service, as well as by organisational measures, in particular the establishment of the Hearing Officer) to safeguard the legitimacy of its decisions. It has to be borne in mind, that the Commission is not an independent authority, but a political organ (resulting in a decision of all commissioners).*

Appeals can be made to the Courts of the European Union, which have full discretion to withdraw the Commission's decision and to reduce, increase and hold the fine; However, an increase of the fine seems only possible if claimants challenge the amount of the fine.[15]

B.2. Nature of the Rules governing the assessment of fines

What procedural rules are in place to govern the determination of fines? (administrative procedure, court procedure etc).

14 The appeal must be submitted to the Federal Cartel Office that forwards it to the prosecutor and the court if it does not remedy it.

15 See *Polzin*, WuW 5/2011, p 456. referring to ECJ, 8 February 2007, C-3/06 P, para 60 ff - Graupe Danone/Kommssion.

Procedural rules with regard to determination of fine are based on

- procedural provisions laid down in competition legislation (e.g., **UK**, **Germany**, **Austria**),
- criminal law provisions (e.g., **Japan**, **Denmark**),
- general procedural rules applicable to civil law proceedings (E.g., **Austria**, **Sweden**),
- special fining rules elaborated by the respective NCA and/or the governmental department which is (politically) responsible for the NCA] (e.g., in the **Netherlands;** to be precise: until 3 years ago the rules were issued by the Dutch NCA itself; currently, the rules are formally issued by the Minister, but have been prepared in close cooperation the NCA) or
- administrative law provisions (e.g., **Italy**, **Norway**, **Netherlands**) which often lay down procedural principles that are applicable to fining decisions of administrative institutions in general.

In countries where the determination of the fine is subject to civil law proceedings, the specific rules may nevertheless be different from the typical framework governing disputes between two private parties. For example, the **Swedish** "rules for actions not amenable to out-of-court settlement *(Sw: indispositiva mål)"* provide the court with certain investigatory obligations and possibilities to obtain evidence, and allow the court (within limits) to base its judgment on circumstances that have not been invoked by the parties. Furthermore, admissions of guilt by a party are not binding for the Swedish Courts, and also the absence of a party in a proceeding cannot result in a judgment by default. Similar results are achieved eg in **Austria**, based on the rules on non-contentious legal proceedings (*Ge: Außerstreitverfahren*) applicable to proceedings before the Austrian Cartel Court.

Side note EU: *Pursuant to Article 23(2)(a) of Regulation No 1/2003, covering, inter alia, the commission's power of investigations, the Commission may, by decision, impose fines on undertakings or associations of undertakings. Procedural rules are further determined by the Commission Regulation No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.*

To what extent is the level of fines determined by legislative rules (e.g. prescribing maximum levels of fines, the approach to be adopted in assessing fines)?

The maximum fines are – by vast majority – determined by statutory law (**Germany**, **France**, **Switzerland**, **UK**, **Sweden**, **Hungary**, **Netherlands**, **Italy**, **Belgium**, **Czech Republic** and **Japan**). **Norway's** limit is governed in a regulation (i.e., secondary law). **Denmark** does not have any legal or regulatory maximum fines.

With regard to the approach to be adopted in assessing fines, the reports refer to

- legal statues (**Sweden**, **Japan**, **Netherlands**),
- administrative law provisions and Commission's Guidelines on the method of setting fines (**Italy**),
- self-binding guidelines (**Germany**, **Czech Republic**, **Netherlands**),
- preparatory works to the legal acts (**Sweden**) and
- case law (**Austria**, **Sweden**).

Side note EU: *With regard to maximum fines reference is made to Art 23, 24 Reg No 1/2003; Art 23 (2) (3) Reg 1/2003 also refers to "the gravity and to the duration of the infringement". Based on Art 23 (2) Reg 1 /2003 the Commission's approach in assessing fines is determined in its 2006 Guidelines on the method of setting fines (see below).*

Are there other (further?) guidelines as to the level of fines or as to the methodology to be used in assessing fines?

Austria, **Japan, Italy** and **Hungary** do not have any national guidelines (in **Hungary**, the respective notice was repealed by the president of the HCA and the chair of the Competition Council of the HCA on 18 May, 2009; in **Italy** the NCA usually refers to the Commission's Guidelines on the method of setting fines). **Norway** has no specific guidelines, but a "*regulation on the calculation of and leniency from administrative fines".*

All other jurisdictions covered do have guidelines. In **Belgium**, the 2004 Fining Guidelines no longer apply, besides cases in which a leniency application was made before the entry into force of the 2007 Leniency Notice; new guidelines on the calculation of fines are yet to be adopted.

Side note EU: *The Commission has been issuing guidelines on the method of setting fines since 1998 ("in order to ensure the transparency and impartiality of its decisions"); the most recent ones had been published in 2006*[16].

16 2006 – Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006, p. 2-5.

- **Who issues the guidelines? Are they binding for the body who determines the fine? Is there a requirement to consult the public on the guidelines and/or do they have to be approved by the legislature or by government ministers?**

With regard to jurisdictions issuing guidelines (incl **Switzerland**, where the Competition Commission has issued so-called Explanatory Notes on the Ordinance on Sanctions), the guidelines are issued by the respective NCAs.

In general, the guidelines are self-binding for the NCAs (based on respective statements of the NCAs). However, in the **UK** the Court of Appeal has held that the OFT may depart from its Guidelines, but that the principles of good administration require that it should give reasons for doing so. Also in **Netherlands**, the NCA may (only) deviate from the guidelines in special circumstances. In **Hungary** the Competition Office took the same approach in its notice (repealed in 2009).

Other national reports did not elaborate the question whether departure in special circumstances is permitted.

Besides the **UK**, where guidance prepared or altered by the OFT must be approved by the Secretary of State, all NCAs covered are independent in its decision to adopt guidelines. No approval by legislature or by government is needed (see, e.g., **Germany**, **Czech Republic**, **Hungary**). However, e.g., in **Sweden**, the public were invited to provide comments on the draft guidelines. Similarly, the **French** NCA consulted the public prior to publishing its guidelines, even though it was not legally required to do so. In the **Netherlands**, although legally not required, the NCA has indicated that it may initiate a 'public evaluation' in the future. Also in **Belgium**, according to a member of the NCA, the new fining guidelines shall be the subject of public consultation.

Side note EU: *The guidelines are issued by the European Commission. The guidelines are not legally binding, but self-binding administrative practice. The Commission may not depart without giving reasons (e.g., ECJ in Danone for 1998 GL)*

- **To what extent do they reflect or relate to procedures used in national law to determine penalties or fines payable for other types of economic crimes/infringements (such as fraud/environmental law/consumer protection)?**

The reports generally confirm that the respective guidelines with regard to competition law do not reflect or relate to procedures used to determine penalties or fines payable for other economic infringements.

This is, e.g., reasoned by the nature of competition law fines. I.e. it is argued that the fines imposed by the NCA are administrative decisions, whereas penalties imposed by courts for most other economic crimes such as fraud fall under criminal law and therefore are subject to different procedures (**Germany**). A similar reasoning is submitted from **Netherlands**, where, since 1998 an administrative act formed the exclusive legislative basis for enforcement of

competition law. In 2007, however, the introduction of the possibility for the Dutch NCA to impose fines on natural persons created a renewed (albeit small) 'link' with criminal law: for the definition of the terms 'de facto directors' and 'commissioning party' in the new rules on personal fines, the Dutch Competition Act now explicitly refers to the Criminal Code.

Also **Switzerland** explains the difference by reference to a fundamental difference in the approach. While competition law (at least in Switzerland) focuses on undertakings, the provisions with regards to, e.g., fraud/environmental law/consumer protection focus on the imposition of penalties on natural persons. Under the Swiss Penal Code undertakings are in principle only sanctioned if a sanction that was normally imposed against a natural person can not be imposed against this person because of the inadequate organization of the undertaking.

With regard to similarities, the **Swiss** report refers to the fact that Swiss Penal Code and the level of fines determined in competition law proceedings both consider the seriousness of the offence. Further, the economic ability of the undertaking to pay the fine is reflected in both proceedings.[17] The **French** report also draws attention to similarities with other areas of law. Thus, the maximum fines which may be imposed by a number of French regulatory authorities (post, audiovisual media, energy) are also determined in relation to the turnover achieved by the infringer.

Side note EU: *The Commission's guidelines do not reflect or relate to procedures used to determine penalties or fines payable for other economic infringements*.

Is there a leniency program in place and what is the legal basis for the determination of the criteria for leniency (legislative rules, other binding/non-binding guidelines)?

In all jurisdictions covered by the international report, there is a leniency program in force (sometimes including, e.g. in **Sweden** and **Italy**, guidelines). In **Japan**, there is no special leniency program with regard to so called "pecuniary penalty" proceedings. However, following the Japanese NCA's practice it will not file accusation against (successful) leniency applicants. As regards the legal base of the leniency program, the reports stressed out that legislative rules are the basis of the program (e.g., in **Czech Republic** the Leniency program was issued in accordance with Art 22 Competition Act). Only in **UK**, there is no specific statutory underpinning for that leniency policy.

The national programs partly refer to the **European Commission's** 2006 leniency notice (e.g., **Belgium**), essentially follow this notice or are even modelled based on the European Commission's Leniency Program (**Denmark**).

17 However, the SPC provides with a maximum absolute fine (5 Mio Swiss Francs), while Article 49a Swiss Cartel Act only provides with a maximum relative fine (10% of turnover of the last three years).

***Side note EU**: See Commission Notice on Immunity from fines and reduction of fines in cartel cases (Text with EEA relevance), OJ C 298, 8.12.2006, p. 17–22*

Are there any rules that permit or require fines also to individuals?

In the following jurisdictions, fines can / must be also imposed on individuals:

- **Germany:** fines up to the amount of EUR 1 m not including any profits gained from the infringement, which the NCA may additionally skim off.
- **Czech Republic:** fine up to CZK 300 000 for breaking a seal while investigating an infringement and/or a fine up to CZK 10 million for committing an offence by breaching the competition law rules.
- **Denmark**: based on the Competition Law Act (stating that a fine can be imposed when "a party intentionally or with gross negligence" infringes competition law), it is now common practice to fine both the company as such and the CEO or other leading employees.
- **Netherlands**: Natural persons may be fined for non-cooperation with the authorities or ordering/de facto directing an infringement of e.g. the Dutch Competition Act or Articles (now) 101 and 102 TFEU. The fine base may be in the range of EUR 10,000 – EUR 200,000 or EUR 50,000 – EUR 400,000, depending on the infringement. The 'basic amount' of the fine is set at the level of this fine base (unlike with corporate persons, where the fine base is multiplied with a certain factor to arrive at the 'basic amount' – see further below).
- **Norway**: based on the Criminal Procedure Act penal fines, as well as imprisonment of up to six years.
- **Japan:** with regard to pecuniary fines, legal entities may be fined only if individuals are accused of acting against the Japanese Antimonopoly Act. This is based on the common understanding in Japan jurisprudence, following which legal entities may not be ethically reprehensible and thus may not be punished independently of individuals violating acts.
- **UK**: A penalty may be imposed on an individual insofar as that individual constitutes an "undertaking" (No such penalty has been imposed to date). Furthermore, individuals involved in certain hard-core anti-competitive arrangements (including bid-rigging, market sharing and price fixing agreements) may be found guilty of an offence under s 188 Enterprise Act 2002 ("the Cartel Offence"), even where they undertook the relevant acts on behalf of a body corporate or in the course of his

employment. If convicted of the Cartel Offence on indictment,[18] penalties include imprisonment for a term not exceeding five years or a fine [which is not subject to a statutory limit]. If summarily convicted of the Cartel Offence,[19] penalties include imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum (presently £5,000 in England and Wales; £10,000 in Scotland and £5,000 in Northern Ireland).[20]

- **Hungary:** Bid rigging in respect of public procurement or concession procedures is a criminal offence which is sanctioned by imprisonment for a term not exceeding five years.

In **Austria**, **Belgium**, **Italy** and **Switzerland** there are no direct sanctions against individuals (i.e. sanctions against individuals for competition infringements). However, e.g., the **Austrian** and **Belgian** legal acts provide for criminal fines in case of bid rigging in respect of public procurement. Additionally, infringements of competition law could constitute other elements of crime such as fraud.

In Sweden, leading individuals of a company may be subject to trading prohibitions for involvement in certain hard core horizontal infringements of the Swedish Competition Act or Article 101 TFEU.[21]

Side note EU: *EU competition law in general addresses (exclusively) "undertakings" (Art 23 (1) (2) Reg 1/2003): Article 23(5) Reg 1/2003 defines fines based on competition law infringements as fines which are "not of a criminal nature".*

What are the overall objectives of fining policy (e.g. to deter further infringements by the undertaking concerned, further infringements by other undertakings, or, to mark the seriousness of the infringement) and are those objectives made transparent (e.g. legislative materials, recitals etc.)?

The overall objectives of the respective national fining policies are often based on

- legal statues ((indirectly) **Italy**),
- preparatory materials / parliamentary exchanges regarding the legislation (**Sweden**, **Belgium**, **Netherlands**, **Denmark**, **Norway**),
- decisions of the courts (e.g., **Austria**, **Italy**, **Hungary**, **UK**, **Italy**),

18 That is, convicted on a trial by jury in the Crown Court.

19 That is, convicted on a trial before magistrates in the Magistrates Court.

20 S.190(1)(b) Enterprise Act 2002, as read with Schedule 1 Interpretation Act 1978 (as amended) Magistrates' Courts Act 1980 s.32 (as amended); s.225(8) Criminal Procedure (Scotland) Act 1995 (as amended); Article 4 Fines and Penalties (Northern Ireland) Order 1984 (as amended).

21 Chapter 3, Section 24 of the Swedish Competition Act.

- decisions of the respective NCAs (**Netherlands**),
- the respective guidelines (**Germany**, **Czech Republic**) or
- statements / annual reports of the NCA (**UK**, **Italy**).

With regard to specific objectives, the objectives mentioned in the national reports are in line with the aims of deterrence and retribution which typically underlie sanctions imposed by the State:

Deterrence / Prevention is specifically mentioned in a number of reports (**France**, **Germany**, **Switzerland**, **Belgium**, **Austria**[22], **Sweden** (mentioning individual and general deterrence), **Czech Republic**, **Japan** (mentioning individual and general deterrence), **Netherlands** (mentioning individual and general deterrence), **Denmark**, **Hungary** (mentioning individual and general deterrence), **Italy** (mentioning individual and general deterrence).

In addition to these general principles, the national policies may also reflect other aims, such as

- Underlining the seriousness of the infringement (**Netherlands**, **UK**)
- Avengement (**Germany**)
- Unjust enrichment (**Japan**, with regard to "surcharges" until 2005)
- Termination of the ascertained anticompetitive conduct (**Italy**)
- Punishing perpetrators of antitrust infringements (**Italy**)
- Effective compliance with the competition rules (**Norway**)
- Sanctions for competition law infringements should be perceived as fair and proportionate in relation to sanctions for violations of other legal obligations of comparable nature (**Norway**)
- Harmonization with the applicable principles in the EU (e.g., **Norway**, **Italy**)

Side note EU: "*Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behavior that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence)", Commission's guidelines, introduction, para 4.*

22 In 16 Ok 4/07 the Cartel Supreme Court stated that fines imposed on cartel law do not encompass any general prevention reasons, as these fines do not address the general public, but only a certain category of addressees, i.e., undertakings which had been involved in an infringement of antitrust law (i.e. cartels and abuse of dominance). They are therefore not targeted on criminal infringements but as a vehicle of public enforcement to accomplish an economic order as intended by the given competition law rules.

B.3. General Methodology used in determining the amount of the fine

There is a growing body of literature analysing the optimal level of antitrust fines, in particular with a view to their deterrent effect. By way of summary, the optimal level of the fine should correspond either to the expected gain from the violation[23] or to the net harm caused by the violation to persons other than the offender[24], in both cases multiplied by the inverse probability of the fine being imposed (eg if the person deciding on whether or not to commit an infringement expects a 10% probability of being fined, the fine should correspond to 10 times the gain or net harm).[25]

As is explained by *Wils*, the difference between the "deterrence approach", which calculates the optimal fine based on the expected gain from the violation, and the "internalisation approach", which is based on the net harm caused to other persons, reflects a difference in views about the primary goal of antitrust. While the "internalisation approach" is aimed at maximising total economic welfare, by allowing the offender to commit efficient infringements whose total benefits exceed total costs, the "deterrence approach" reflects a consumer welfare perspective and hence does not take account of the welfare benefits to offenders brought about by the infringement.[26]

Irrespective of whether the fine is calculated based on expected gain or net harm, the expected probability of a fine being imposed, if low, may lead to high fines. However, as also pointed out by *Wils*, total deterrence by means of very high fines (counterbalancing a low probability of detection) is not necessarily desirable.

For one, very high fines may entail social and economic costs (such as harm to creditors due to bankruptcy, harm to employees due to cost-cutting programmes, and harm to the State by lower tax receipts). But importantly, the retributive view of punishment also imposes limits on the level of the fine. Under the retributive view, the punishment inflicted on the offender should be proportional to his wrongdoing.[27] This view is reflected, eg, in constitutional documents such as the Eighth Amendment to the US Constitution (which prohibits excessive fines), or the Charter of Fundamental Rights of the European Union (which stipulates, in Article 49 para 3, that the severity of penalties may not be disproportionate to the offence).

While it is very difficult, if not impossible, to establish to what extent a given level of fines reflects these parameters,[28] the national reports clearly bring out that deterrence and

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23 *See* eg *Wils*, Optimal Antitrust Fines: Theory and Practice, 29 World Competition 2006, 183; *Motta*, On Cartel Deterrence and Fines in the European Union, ECLR 2008, 209 (212).

24 *See* eg *Combe*, Quelles sanctions contre les cartels? : une perspective économique, Revue internationale de droit économique, 2006, 11.

25 Cf. also OECD, Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes (2002), 85.

26 *See Wils*, FN 23 above.

27 *See Wils*, FN 23 above.

28 *See* eg *Connor*, Has the European Commission become more severe in punishing cartels? Effects of the 2006 Guidelines, 2011 ECLR 27, and *Motta*. FN 23 above, for differing views on the severity of the European Commission's fines.

retribution serve as the main guiding principles in the jurisdictions examined (see above). In some cases, these guiding principles have even been expressly endorsed – for example, pursuant to the **Austrian** Supreme Court, the theoretical ideal amount of a fine based on a cartel infringement should be the amount of the profit achieved in the Cartel plus a margin which guarantees that the infringement is not the consequence of a rational decision.[29]

Please briefly summarise the methodology used to determine the amount of the fine (only key factors)

Due to national varieties, an answer covering all national methodologies in determining the amount of the fine is quite complex.

However, most NCA's directly (e.g., by referring to it) or indirectly follow the European Commission's approach in its Guidelines on the method of setting fines.[30]

Therefore, in general, the basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement,[31] multiplied by the number of years of infringement. National fining systems then provide for adjustments to the basic amount, based on aggravating and mitigating factors.

Nonetheless, the additional 15% to 25% charge, which the Commission includes in the basic amount for purposes of deterrence, is not part of most of the national fining methodologies.

A general scheme may be scrutinized as follows:

- First, respective turnover
- Second, basic amount
- Third, additional charges / reduction of fine (aggravating and/or mitigating circumstances)

First step, relevant turnover

The basic amount is founded on relevant turnover figures.

29 Case No. 16 Ok 4/09 – *Industrial chemicals*, decision of 25 March 2009; Case No. 16 Ok 5/08 – *Elevators and escalators*, decision of 8 October 2008.

30 Official Journal C 210 , 01/09/2006 P. 0002 – 0005; Although, with regard to the EU's guidelines, the Austrian Cartel Supreme Court rejected a request for automatic application in proceedings concerning national law, the NCA in requesting and the courts in imposing fines are, in general, following the Commission's approach.

31 Based on, e.g., nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

In general, this turnover consists of the turnover which was achieved by the infringer(s) with the supply of products/services concerned during the last full business year of its participation in the infringement ("general approach"). This is in line with the European Commission's guidelines, where, as a basic amount, the Commission will take a certain proportion of the value of the undertaking's sales of goods or services to which the infringement relates in the relevant geographic area within the EEA.

However,

- In **Hungary**, there is no statutory guidance as to which year's turnover should be taken into account for setting the amount of the fine (within the 10% statutory threshold). The NCA decides on a case-to-case basis whether to take the turnover in relation to the last year of its participation in the infringement or the last year preceding the decision.

- In **Denmark**, there are ranges for basic amounts of fines depending on the gravity of the infringement ("less serious","serious" and "very serious").[32]

- Also in **Japan**, with regard to "pecuniary penalties", the fine imposed is determined within a minimum and maximum range.

Second step, basic amount

Based on this turnover, the basic amount of the fine will be related to a proportion of the value of sales. The percentage / proportion chosen depends on several factors such as "gravity", "seriousness", "nature of infringement", "duration" etc. However, in the national systems itself, the factors are applied differently. E.g., the duration might be part of the valuation of the "basic amount" (e.g., Germany) or taken into account only after the basic amount has been defined (see Third step).

- In **Germany** the basic amount can amount to up to 30 % of the domestic turnover of the undertaking concerned generated from the selling of the product or service related to the infringement.[33] The respective percentage refers to the gravity and the duration of the infringement. The gravity of the infringement depends on its nature, its impact on the market, the market share of the companies involved and the size and importance of the affected market.

- In **Japan** (with regard to the surcharge-proceedings), the surcharge is calculated by multiplying the sales amount of the relevant goods or services for the period during

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32 Less serious infringements have a basic amount of 10.000-400.000 Dkr (appr. 7,5 DKR / 1 Euro), serious infringements a basic amount of between 400.000 DKR and 15 mio DKR, and very serious infringements effect in fines larger than 15 mio DKR.

33 With regard to Merger control law, up to 30 % of the turnover the involved undertaking generated on the domestic markets affected by the merger.

which the infringement is continued by the rate of 10%. The rate can be decreased[34] or increased (e.g., repeated infringements).

- In the **UK**, the OFT selects a "starting point" for the financial penalty which is a percentage between 0% and 10%, depending on the seriousness of the infringement. Seriousness is assessed on basis of a number of factors, including the nature of the product, the structure of the market, the market share(s), entry conditions, the effect on competitors and third parties and the damage caused to consumers.

- In **Austria**, the basic amount amounts to a percentage between 10% and 30% of the basic turnover. The percentage rate is dependent on factors such as the nature of the infringement, its geographic coverage, the degree of fault, market shares, the intensity of the infringement etc.

- In **Switzerland**, depending on the severity and type of the violation, the base amount can be up to 10% of the Swiss turnover of the undertaking in the relevant market, however in the last three years.

- The **Netherlands** take a percentage of 10% of the relevant turnover as the 'fine base'.[35] This fine base is them multiplied by a factor E depending on the seriousness of the infringement (maximum factor 5) to arrive at the basic fine (or 'basic amount'). For reasons of 'special deterrence', the NCA may adapt the basic amount with a view to the value of turnover of the party concerned in the Netherlands.

- In **Italy**, the basic amount of the fine is calculated considering the degree of seriousness of the infringement[36], multiplied by the number of years of participation in the infringement (maximum level of up to 30 % of the value of sales).

- **Norway**: The calculation of fines is affected by gravity and duration of the infringement. In assessing the gravity of an infringement, particular consideration is given to the nature of the infringement; the actual effect of the infringement on the market; the size of the affected market; the undertaking's profits, degree of guilt, and; whether the person infringing the Act has played a leading or a passive role in the infringement. Other elements that can influence the calculation of the fine are, *inter alia*: whether the arrangement or action was carried out; whether the undertaking through guidelines, instruction, training, supervision or other actions could have

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34 (e.g., 3% concerning retail; 2% wholesale, furthermore, decreased rates are applicable to companies whose capital and number of employees are less than certain levels or companies which discontinued infringement in certain short terms).

35 For other infringements – mainly competition infringements in regulated sectors, but also e.g. not fulfilling requirements for cooperation with the authorities – the amount of the fine base will be determined in the Netherlands on the basis of a permillage (0.25% and 15%) of the total turnover of the infringer in the previous financial year to the decision.

36 The degree of seriousness is based on factors such as the anticompetitive effects deriving from the infringement, the context in which the challenged conduct took place, the importance, the number and the economic strength of the undertakings that carried out the infringement together with the market share held by each of them on the relevant market, the profit gained by the perpetrator(s), undertakings' awareness of the illicit nature of their conduct, duration of the infringement.

prevented the infringement; whether the undertaking has assisted the NCA in its investigation of the infringement, and; the financial position of the corporate group of which the undertaking is a part.

- In **Sweden**, in assessing the sanction value, in a first step the gravity of the infringement is taken into consideration. In this regard, particular (but not exhaustive) account must be taken of the nature of the infringement,[37] the size and significance of the market[38] and the infringement's actual or potential impact on competition in the market.[39]

- In the **Czech Republic**, the NCA will determine a basic amount of the fine based on the intensity of the breach of competition law. Therefore, the basic amount will be set depending on the degree of gravity of the illegal conduct.[40]

Third step, additional charges / reduction of fine

As mentioned above, national methodologies differentiate in the respective factors applied, but also in the set-up. E.g., "duration" may be considered in different steps of determination of a fine. As can be seen from the national examples below, duration, also in a later stage often increases the (already determined basic amount of the) fine as an additional charge. Also turnover of undertakings concerned, gravity or negligence can be used (only) at a later stage.

With regard to aggravating and mitigating circumstances the reports, in general refer to factors, which are often in accordance with the Commission's guidelines. I.e. reference is made to aggravating circumstances, such as recidivism, refusal to cooperate, role of leadership. On the other side, mitigating circumstances may be negligence, limited involvement, effective cooperation with the NCA outside the scope of the respective Leniency Notices etc.

Some jurisdictions do have special additional charges (see, e.g., **Germany** or **the Netherlands**, where, an additional amount of up to 100 % can be charged for reasons of deterrence).

Regarding the respective jurisdictions:

- **Germany:** For reasons of deterrence, an additional amount of up to 100 % of the basic amount can be added to the fine. Aggravating circumstances that may also be taken into consideration when determining the amount of the fine are intent, gross

37 Infringements that are considered as particularly serious are infringements by object (or *per se* or hard core infringements), such as horizontal price fixing and/or market partitioning cartels and restriction of output.

38 The broader the geographic market an infringement encompasses, the more serious the infringement is considered to be.

39 With respect to infringements by object, any effects on the market need not to be established. In respect of competition law restrictions by effect, these may have to be considered as part of the analysis.

40 Generally up to 3 % of the value of sales on the most serious infringements, up to 1 % of the value of sales on serious infringements, and up to 0.5 % of the value of sales on less serious infringements.

negligence, repeated offence, an active role in the cartel (cartel leader or initiator), degree of organisation of the cartel, threat of retaliation. Extenuating circumstances are positive comportment after the infringement (e.g. compensation of third party losses), coerced participation or passive role in the cartel or the authorisation of the infringement by an authority or legislative rules.

- **Italy:** The NCA basically follows the Commission's Guidelines. Consequently, for instance, aggravating circumstances can be: the leading role played in the infringement by an undertaking; possible obstructive behaviour which renders the investigation more difficult, recidivism and the awareness of the anticompetitive nature of the conduct. On the other hand, cooperation during the investigation, actions taken to remedy/mitigate the consequences of the infringement, the presence of legal provisions/public authorities' measures authorizing or encouraging the challenged anticompetitive behaviour can lead to a reduction of the basic amount of the fine.

- **Hungary:** The NCA considers the legal criteria such as gravity of the infringement, duration of the infringement etc. as well as other aspects potentially relevant for the case, individually and in their entirety, typically qualifying them either as aggravating or mitigating circumstances. However, in the vast majority of cases, neither the exact basic amount nor the exact weight allocated to the different circumstances increasing or decreasing the fine can be deducted from the HCA's decisions.

- Also, in the **Netherlands**, the basic fine, may be increased or reduced because of aggravating (e.g. obstruction of the investigation) / mitigating (e.g. voluntary ceasing the infringement) circumstances. Furthermore, the basic fine may, in cases of very serious infringements, be increased by a 'basic fine surcharge' of max 25% of the relevant turnover in the last year in which the undertaking participated in the infringement. Finally, the basic fine will in principle be increased with up to 100% in cases of recidivism.

- In **Austria**, the duration of infringement can be an additional charge. E.g., the basic amount is multiplied by the number of years of participation in the infringement. Alternatively, due to the duration factor the basic amount was increased in the form of a lump-sum 50%[41]. However, in one case, the duration of the infringement did not increase the basic amount.[42]

- **Norway:** The duration of the infringement also affects the calculation of fines. For an infringement that has lasted between one and five years, the amount of the fine can be increased up to 50 percent. When the duration of the infringement exceeds five years, the amount can be increased up to 10 percent for each year the infringement has lasted.

41 Elevator cartel.

42 "Europay", 16 Ok 4/07.

- Also in **Belgium**, the fine is increased for duration. Additionally, aggravating and/or attenuating circumstances (e.g., unlike other members of the cartel, a member was only active at the distribution level but not at production level) as well as cooperation with the authority in the course of the investigation are taken into account. Rejected mitigating circumstances are, e.g., the economic crisis, existence of a compliance program, or the 'complexity' of the case. Finally, proportionality and deterrence are taken into consideration.

- In the **Czech Republic**, after multiplying the (so-called) basic share by the time coefficient of duration of the infringement, the NCA will examine mitigating and aggravating circumstances which, relating to particular competitors, may adjust the basic amount of the fine upwards or downwards by the maximum of 50%.

- Comparable to its basic amount approach, **Denmark** provides for a scaling additional charge for duration: If the infringement took less than a year, there is no increase, up to 5 years infringement effects in an increase up to 50 %, and long duration, meaning more than 5 years gives increase of 10 % per year. Aggravating, mitigating circumstances and account of the turnover of the company involved are considered too.

- In the **UK**, penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. In a next step, the fine may be increased to ensure deterrence as part of a case-by-case examination. The OFT also adjusts the penalty for aggravating[43] and mitigating[44] factors. Last, the OFT may adjust the penalty to avoid exceeding the maximum penalty of 10% of worldwide turnover and if necessary, the 'double jeopardy' principle (with regard to fines imposed by the European Commission, or by a court or other body in another Member State).

- Once the sanction value has been determined in the **Swedish** procedure, the duration of the infringement(s) is considered. The longer the duration, the more serious the infringement is considered to be. Thereafter, aggravating and attenuating[45] circumstances relating to the undertakings' infringement(s) are included in the assessment. Additionally, the nature of the infringement and the financial status of the undertaking are taken into consideration.

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43 Aggravating factors include: the role of the undertaking, involvement of senior management, continuing the infringement after the start of the OFT's investigation, repeated infringements by the same undertaking or other undertakings in the same group; infringements which are committed with the intentionally rather than negligently; and retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

44 Mitigating factors include: the role of the undertaking (e.g. pressure), genuine uncertainty as to whether the agreement or conduct constituted an infringement, adequate steps having been taken with a view to ensuring compliance, termination of the infringement as soon as the OFT intervenes and co-operation which enables the enforcement process to be concluded more effectively and/or speedily.

45 The fact that an undertaking has suffered harm by participating in a cartel or participates as a result of coercion are not deemed extenuating circumstances.

- In **Switzerland**, the Competition Commission assesses the duration of the infringement. If the infringement lasted for between one and five years, it increases the base amount by up to 50%. If the infringement lasted longer than five years, the base amount for each additional year is increased by a supplement of up to 10% (Article 4 Ordinance on Sanctions). In a next step, aggravating (e.g. repeated infringements, particularly high profit, refusal to cooperate with the authorities etc.) and attenuating (e.g. passive role, not carried out retaliation measures which had been agreed upon) circumstances (Articles 5 and 6 Ordinance on Sanctions) are assessed.

Side note EU[46]:

A. Commission's Calculation of the Basic Amount:

A.1. Variable Amount
• Calculation of the value of sales directly or indirectly related to the infringement
• Fixing a percentage between 0-30% depending on the gravity of the infringement (in particular the nature) – for cartels "at the higher end"
• Multiplication with the number of years
A.2. "Entry fee"
- *15-25% of the value of sales*
- *No multiplication with the number of years*
- *Always for cartels, optional for other infringements*

B. Adjustments of the Basic Amount:

B.1. Aggravating circumstances:
- *Repeat offences (recidivism), Increase of up to 100% per prior decision*
- *Refusal to co-operate or attempts to obstruct the investigation ("Videotapes")*
- *Role of leader (operation) or instigator (establishment) ("Candle waxes")*

B.2. Mitigating circumstances:
- *_ Termination of infringement as soon as Commission intervenes (not cartels)*
- *_ Negligence (not cartels, rare)*
- *_ Limited involvement ("adopt competitive conduct")*
- *_ Intervention by public authorities or legislation*

B.3 Multiplier (deterrence)
- *For companies with "a particularly large turnover beyond the sales of goods/services to which the infringement relates*

C. Final Considerations

C.1. 10% TURNOVER CAP
- *Preceding business year (unless not representative)*

C.2. APPLICATION OF THE LENIENCY NOTICE
C.3. INABILITY TO PAY
- *Only examined "upon request" of undertaking*
- *Only "exceptionally"*
- *Must "irretrievably jeopardise economic viability"*
- *"Specific social and economic context.*

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46 See "The European Commission's Policy on Cartels Fines, Leniency and Settlements", Donncadh Woods, European Commission, DG Competition.

Does the methodology vary depending on whether the infringement is unilateral (e.g. monopolisation/abuse of dominant position, failing to notify a merger) or multilateral (e.g. cartels)?

Economic theory indicates that fines for unilateral and multilateral infringements need not be the same. In particular, it may not be necessary that for each prospective member of a contemplated cartel, the expected fine exceeds the expected gain, as long as a sufficient number of prospective members are deterred so as to make the cartel unworkable (even if for the other members, the expected gain would exceed the fine). Thus, deterrence may already be effective in case of multilateral infringements at lower fine levels.[47]

Nevertheless, the national reports indicate that the basic methodology is in general the same, irrespective of whether the infringement concerns a breach of Article 101 or 102 TFEU (and/or the national) equivalent provisions.

However, as illustrated above, the nature of the infringement is often one of the factors taken into consideration when assessing gravity for the purpose of calculating the fine (e.g. **Norway**). Furthermore, certain factors which are stated to be relevant at certain steps may be specific to unilateral or multilateral infringements.

Exceptions:

Japan, where – with regard to the surcharge-proceedings – the rates to be used for calculating the surcharge vary depending on whether the infringement is unilateral. The rate for unilateral infringements[48] is less than that for bilateral infringements such as cartels, bid-riggings, etc. Also **Germany** has a different calculation of the relevant turnover.

In case of multilateral infringements, the **Czech** NCA shall take into account also the common market share of all participating undertakings when stipulating the basic share of fine (Article 30 of the Guidelines).

Again, in general, it can be stated that due to the nature of infringements with regard to merger control law (e.g., misleading information, non-implementation of remedies), the fine system / methodology is different.

Side note EU *The Commission's guidelines determine the method for the setting of fines with regard to both, infringements of Art 101 and Art 102 TFEU (see, e.g., Commission's guidelines, introduction, para 8).*

47 *See Wils*, FN 23 above.

48 Other than private monopolization arising from the control of the business activities of other undertakings.

Is there a maximum fine that may be imposed? If so, how is that maximum amount determined?

As outlined in 2.2., the maximum fines are – by vast majority - determined by law (**Germany**, **Switzerland**, **UK**, **Sweden**, **Hungary**, **Netherlands**, **Italy**, **Belgium**, **Czech Republic**, **Japan**). **Norway's** limit is governed in a regulation. **Denmark** does not have any legal or regulatory maximum fines.

Concerning maximum levels of fines for undertakings or a group of undertakings for infringement of competition law in substance[49], the general approach is that the fine may not exceed 10 % of the worldwide turnover generated in the business year preceding the decision. The turnover encompasses not only the turnover of the undertaking involved in the infringement, but the turnover of the whole group (as determined in Art 4 (2) ECMR).

Therefore, the national systems are in line with the approach of Art 23 (2) of Reg 1/2003. However, there are some national distinctive "features":

- E.g., in **Belgium**, the maximum cap is not 10% of worldwide turnover but 10% of the undertaking's (or the association's) turnover in Belgium AND the turnover generated from exports from Belgium.

- In **Sweden**, the Market Court held that the relevant turnover according to the 10 per cent turnover rule for calculating the fine, is the turnover of the undertaking concerned, and not that of the whole company group.

- The same ("traditional") rule applied in **Hungary** until 2005. Since then it is apparently[50] possible for the NCA to apply whether the traditional or "wider" approach, i.e., including all turnover of the group of undertakings to which the given undertaking belongs.

- Also in the **Netherlands** until 2005, the maximum fine was capped with 10% of the net turnover of the respective undertaking involved in the cartel. Only since then it is (in accordance with Reg 1/2003) 10% of the turnover of the group of undertakings, to which the concerned undertaking belongs to. Furthermore, there is a "double" maximum fine in Netherlands, i.e., the maximum level of administrative fines for breaches of competition law is set at EUR 450,000 or, if this is greater, at 10% of the turnover in the previous financial year, whichever is higher.

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49 (i.e., infringement of Art 101 TFEU / Art 102 TFEU (or their respective national equivalent), but not for, e.g., providing incorrect or misleading information, non compliance of interim measures or commitments).

50 The law refers to "or", case law is not entirely clear.

- Similarly, in the **Czech Republic**, where the maximum fine is up to CZK 10,000,000 or up to 10 % of the total turnover achieved by the undertaking depending on which of the amounts would be higher.[51]

- In **Switzerland** the cap is also 10% of the turnover generated, however with regard to the group turnover in Switzerland in the three business years preceding the decision.

- In **Germany**, the NCA, additionally to the maximum fine of 10 % of the worldwide turnover may skim off the profits resulting from the infringement from the involved undertakings. Also in **Japan**, with regard to "surcharge" proceedings, there is no maximum fine.

- **Denmark** and **Japan** (with regards to "surcharges") do not have maximum fines.

Side note EU *The fine shall not exceed 10% of the sum of the total turnover in the preceding business year (Article 23(2), Regulation 1/2003*

Insofar as the fine depends on the seriousness of the infringement, explain whether and (if so) how the following factors are assessed and taken into account:

- **the role played by the undertaking in the infringement**

In all the jurisdictions covered, the role of the undertaking is one of the factors considered in the assessment of the gravity of the infringement[52] and therefore with regard to the fine imposed. Key factor is whether the undertaking has had an initiating, leading or passive role in the infringement. Depending on the role, the fine will be increased (e.g., if other undertakings are motivated or put under pressure to commit an infringement) or reduced.

Side Note EU*: the role of leader in, or instigator of, the infringement is an aggravating circumstance (see Commission's guidelines, para 28; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement*)

- **the effects of the infringement;**

Again, also the infringement's actual impact is, in general, one of the circumstances which, in particular, shall be taken into account when determining the fine to be imposed.

In this regard, it is remarkable that

51 Section 22 of the Competition Act.

52 In **Italy,** the seriousness of the infringement is both, a **condition** for the imposition of fines as well as one of the most important **criteria** to be taken into account in order to quantify the relevant amount.

- in **Switzerland** sanctions are imposed for behaviours under which competition is eliminated or significantly impeded. Hence, an effect on competition is conditional for the imposition of a fine. Depending on the size of the effect (elimination of competition or significant impediment of competition which cannot be justified on the grounds of economic efficiency and other aspects such as the number of market participants involved etc.), the Competition Commission will define a lower or higher base amount for the calculation of a fine.

- in **Austria**, in general, the factor "effect" is not considered of being of substantive importance, concerning the approach itself, case law is not clear: While the court once[53] considered an abuse of dominance as "less grave", as there had been no extensive effects on the relevant market, the Cartel Court ruled in another case[54] that the fact that (cartel) agreements were partially not implemented, would not necessarily considered mitigative.

- in **Sweden**, the effects are to be considered when the infringement as such is not to be considered as a per se or hard core infringement.[55]

- in **Hungary**, the effect will be taken into account. However, also the absence of restrictive effects on competition has to be considered as a mitigating circumstance for the purpose of fixing the fine; on the other side, the failure to prove the effect as such, is not considered to be a mitigating circumstance.

- In **Italy**, the NCA takes into account the actual anticompetitive effects resulting from the ascertained infringement particularly in determining the amount of fines in cases concerning abuse of dominance (e.g., namely, considering the prejudice caused by the responsible undertaking to the competitive structure of the relevant market, in case of exclusionary abuses, or to the victims of exploitative abuses). However, the actual effects are usually taken into consideration also in hard core cartel cases, in order to assess the gravity of the ascertained infringements, even if they are prohibited by object. In some recent judgments concerning hard core infringements cases, the administrative courts maintained that the anticompetitive nature by object of certain infringements, such as horizontal agreements on prices/market partioning, suffices to qualify them as very serious antitrust violations, even in the absence of actual effects.

Side note EU: *One of the circumstances to determine the basic amount of the fine (up to 30 % of the value of sales) is whether or not the infringement has been implemented (see Commission's guidelines, para 22)*

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53 Case No. 16 Ok 3/06 – Multiplex / Constantin Filmverleih.

54 Industriechemikalien.

55 Prop. 2007/2008:135, page 124.

- **duration of the infringement;**

As illustrated in 2.3., first bullet point, the NCAs of the jurisdictions covered take into account the duration of the infringement.

This can be implemented by means of a lump-sum percentage of e.g. 50% (e.g., **Norway**) or a percentage of up to 50% (e.g. **Switzerland** with regard to infringements between 1 and 5 years) or simply by multiplying the basic amount with the number of years (e.g., in **Italy**, with regard to fixing a basic amount of the fine).

In **France**, the reference value on the basis of which the fine is calculated is different for the first year of the infringement and for the remainder of its duration. For the first year, the percentage amount of the fine is applied to the total value of sales in question, while for the following years it is applied to half of that value.

Some authorities, e.g. the **Hungarian** NCA, also reduce fines due to short durations of infringements.

*Side note **EU**: As outlined above, in order to take fully into account the duration of the participation of each undertaking in the infringement, the Commission multiplies the amount determined on the basis of the value of sales by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year (see Commission's guidelines, para 24).*]

- **the persons affected by the infringement (e.g. consumers or vulnerable groups);**

Besides general aspects (e.g., all infringements of competition law are harmful to consumers and should therefore be indirectly taken into account in the decision; circumstances a fine can be based on are often only defined non-exhaustively, consumer harm to be considered as part of the determination of the sanction value of an infringement), the group of persons affected is, in general, not taken into account for the determination of the fine.

However, in **Hungary** it is legally stated that if the infringement affects vulnerable consumer circles, this has to be considered as an aggravating factor. In **Czech Republic**, the NCA stipulates a similar approach.

In **Italy**, in evaluating the seriousness of the infringements and determining the level of fines to be imposed, the nature of goods/services concerned and therefore, consequently, also the characteristics of the subjects, who purchase the said goods/services, are taken into account (see, e.g., the recent cases concerning price-fixing agreements in the sectors of pasta and bread). In another case, concerning milk for infants, the decision of the NCA (confirmed by courts) qualified the challenged conduct as very serious, since the increase of resale prices was directly charged to consumers.

Side note ***EU****: The persons affected by the infringement are not explicitly listed in the Commission's guidelines as a circumstance to be considered; However, it is undisputed that consumer welfare is one of the substantial objectives of EU competition law, see, e.g.:*

"The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare"[56]*; "the prejudice of consumers" is also explicitly quoted in Article 102(2) lit. (b) TFEU."*

- **the size of the affected market/relevant economic market;**

In general, the size of the affected market/relevant economic market is one of the circumstances particular consideration will be given to when assessing the gravity of the infringement and therefore the amount of the fine. (Only) a regional market affected can be considered as a mitigating factor (**Austria**).

Side note ***EU****: As outlined, the basic amount is based on the undertaking's turnover and not on the size of the affected market; However, the combined market share of all the undertakings concerned and the geographic scope of the infringement are to be considered with regard to the basic amount (Commission's guidelines, para 22); therefore, the basic amount is indirectly affected by the size of the relevant economic* market.

- **the existence of a genuine compliance policy at the time of the infringement;**

The national reports submitted provide varied answers with regard to the question whether a genuine compliance policy is taken into account as an attenuating circumstance.

The answers vary from a straight "no" (**Germany**, **Sweden**, **Hungary**), a "maybe" (**Czech Republic**, **Switzerland**, **Norway, Italy, Japan, the Netherlands**) to a straight "yes" (**Denmark**). In **France**, while the existence of a compliance programme does not as such qualify as an attenuating circumstance, companies admitting the infringement and undertaking to amend their behaviour through strong compliance programs may obtain a reduction of up to 25 % to 30 %. In **UK**, a reduction in fines between 5 and 10% is possible, where the parties have introduced a compliance program as a result of the infringement (Guidance published in October 2010).

In **Austria**, the FCA / Cartel Courts did not apply a deterrent factor for large undertakings against a global player involved in the elevator cartel, inter alia due to the „Zero Tolerance Policy" applied by this undertaking in Austria.

Side note EU*: Compliance programs are not considered as a mitigating factor by the Commission: "However, the Commission considers that it is not appropriate to take the existence of a compliance programme into account as an attenuating circumstance for a*

56 Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 13.

cartel infringement, whether committed before or after the introduction of such a programme"[57]*.*

- **the involvement of senior management in the infringement;**

Again, the answers vary from a straight "no" (**Germany**[58], **Hungary, Italy**), a "maybe" (**Switzerland**, **Norway**) and to a "yes" (**Sweden**, **Austria**[59]**, Denmark, Netherlands**).

Side note EU*: "The proven involvement in the cartel of the most senior level of management underlines the need to set the fine at a level which ensures it has sufficient deterrent effect".*[60]

- **any intention by the undertaking (or employees involved) to harm competition, or recognition that competition would be or would be likely to be harmed;**

The answers can be summarized with a simple "yes", intention often is (e.g., **Germany**, **Hungary**, **Norway**, **Denmark, Netherlands**) or at least "maybe" (**Czech Republic**, **Sweden**) considered as an aggravating factor.

In **Italy**, it is not necessary for the NCA to demonstrate the intention or the negligence of the undertaking concerned, since the law burdens the undertaking with a rebuttable presumption of negligence concerning the committed infringement. In any case, the fact that an undertaking was fully aware of the anticompetitive nature of the conduct it carried out is taken into consideration in assessing the seriousness of the ascertained infringement and usually plays a role as aggravating circumstance.

In **Switzerland**, it is explicitly stated by the Federal Council that fault is not required to impose sanctions (however, in its practice, the criterion of fault is assessed).

Side note EU: *Where the undertaking provides evidence that the infringement has been committed as a result of negligence, the European Commission may reduce the basic amount of the fine (Commission's guidelines, para 29); in this regard "intentional" means an intention to restrict competition and not an intention to infringe competition law:*
"For an infringement of the competition rules of the Treaty to be regarded as having been committed intentionally, it is not necessary for an undertaking to have been aware that it was infringing those rules; it is sufficient that it could not have been unaware that its conduct was aimed at restricting competition."[61]

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57 COMP/E-23/38.359 Electrical and mechanical carbon and graphite products OJ [2004] L 125/45 at 313.

58 However, members of senior management taking part in an infringement of competition law may be fined individually.

59 "Aufzugskartell", 16 Ok 5/08.

60 Case No IV/35.691/E-4: — Pre-Insulated Pipe Cartel, Para 169.

61 See, e.g., (Case T-143/89 Ferriere Nord v Commission [1995] ECR II-917, paragraph 41.

- **whether the infringing conduct could reasonably have been regarded as lawful or was of a type not previously found to be an infringement;**

Again, national approaches differentiate.

In **Germany** / **Denmark** the respective factor is considered as an extenuating circumstance. In **Sweden** / **Norway**, the factor may be deemed attenuating (at least if the conduct was encouraged or approved by a public authority).

In **Austria** the relevance of this factor is not entirely clear. Recently the circumstance was considered under the question of fault and resulted in a non-imposition of a fine.[62] On the other hand, e.g., approval of the Austrian Telecommunication regulator was not accepted as a factor excluding a fine.

Also in **Italy** the factor (besides accepted as a mitigating factor, e.g., in cases where a fact was examined in previous cases without ever being challenged) could exclude the fault or the seriousness of the ascertained infringement and therefore the imposition of a fine. Also conduct previously authorized by a sector regulator cannot be qualified as a serious antitrust infringement. Additionally, in another case, the novelty of the contested infringement resulted in symbolic fine.

Side note EU: *" numerous factors led the applicants to believe that the contested agreement was lawful. […] it suffices to point out that it at least gave rise to doubts on the part of the applicants and led them to believe that their agreement was not unlawful..[…] In light of all of those circumstances, the Court of First Instance considers, in the exercise of its unlimited jurisdiction, that there is justification for not imposing a fine in the present case.* [63]

See also: "where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation" the basic amount may be reduced due to mitigating circumstances (Commission's guidelines, para 29).

- **the leading or subsidiary role played by the undertaking in the infringement;**

All reports answering this question, mention that the fact that an undertaking holds a leading role in the infringement is considered to be aggravating circumstance, while, on the other side, a subsidiary role is assessed as a mitigating circumstance.

Side note EU*: The "role of leader in, or instigator of, the infringement" is considered as an aggravating circumstance (see Commission's guidelines, para 28): "For Henss/Isoplus, the*

62 Freight Forwarding cartel, decision of Cartel Court as court of first instance.

63 T-86/95, Compagnie générale maritime and Others v Commission of the European Communities, para 240 ff.

Commission must take into account two additional aggravating factors, namely 1. the leading role played by this undertaking in the enforcement of the cartel […]"[64]

- **previous infringements of competition law and or other serious economic crimes or infringements?**

Previous infringements are taken into account / may result in a higher level of fine (e.g., in the **Netherlands**, generally doubling the fine). In **Italy** it was recently restated, inter alia, that the number of years elapsed between the past infringement(s) and that subsequently ascertained does not affect the NCA's power to consider the relevance of recidivism.

In **France**, the legal framework provides for certain limits which the NCA has to respect when considering recidivism. In particular, the earlier decision must be final (ie interim measures or commitments do not suffice) and binding. Furthermore, the new infringement must be identical or similar to the earlier violation of the antitrust rules. Finally, the French regime provides for a time limit: the fine may only be increased for recidivism if the period between the finding of the earlier infringement and the start of the new infringement was less than 15 years.

***Side note EU**: Where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82: the basic amount will be increased by up to 100 % for each such infringement established (Commission's guidelines, para 28)]*

- **co-operation (other than taking advantage of a leniency program) with, or obstruction of, the investigation, or by a decision not to contest the competition authority's allegations**

In general, effective cooperation outside of leniency programs may qualify as a mitigating factor for purposes of fine calculation. However, this does not extend to undertakings merely meeting their obligation to provide information to the NCA. in a complete and timely manner. Furthermore, non-cooperation often results in (procedural) fines in itself, but is often (e.g. in **the Netherlands**) identified as an aggravating factor in determining the fine.

***Side note EU**: "where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so" the basic amount may be reduced due to mitigating circumstances (Commission's guidelines, para 29)*.

64 Case No IV/35.691/E-4: — Pre-Insulated Pipe Cartel, Para 179.

- **measures taken by the undertaking since the infringement to prevent future infringements (e.g. to introduce a more effective compliance programme) or to compensate victims of the infringement?**

Measures taken by the undertaking since the infringement may be considered as a mitigating factor in some jurisdictions (e.g., **Norway** and **Czech Republic**). However, with regard to **Italy, Germany** and **Sweden**, the introduction of a compliance program after an investigation is initiated is not deemed to constitute a mitigating circumstance.

A voluntary compensation of victims may be construed as an extenuating circumstance (see e.g., **Sweden, Netherlands, Hungary** or **Germany**). In **Italy**, a spontaneous implementation of commitments, submitted to the NCA during the investigation but not accepted by the latter, was considered as a mitigating circumstance.

Side note EU*: see above, the Commission does not consider a compliance programme as an attenuating circumstance for a cartel infringement, whether committed before or after the introduction of such a programme"*[65]*.*

With regard to compensation of victims:" The only extenuating circumstance of which the Commission can take account in relation to ABB is the payment of substantial compensation to Powerpipe and its previous owner. In recognition of this element, the Commission will apply a reduction of ECU 5 million to the basic amount." [66]

Insofar as the fine depends on the size or economic power of the undertaking, explain whether and (if so) how the following factors are assessed and taken into account: -

- **the turnover of the undertaking in the affected markets;**

It is the turnover of the undertaking in the affected markets, which serves as the basis for the calculation of the base amount.

In the **UK**, it was additionally held that account should also be taken of the typical margin on turnover earned in the industry in question, in order to ensure that the ultimate penalty represents a proportionate and sufficient punishment and deterrent.[67] In **the Netherlands**, for reasons of 'special deterrence', the NMa may adapt the basic amount with a view to the value of turnover of the party concerned in the Netherlands

Side note EU*: "In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement*

65 COMP/E-23/38.359 Electrical and mechanical carbon and graphite products OJ [2004] L 125/45 at 313.

66 Case No IV/35.691/E-4: — Pre-Insulated Pipe Cartel, Para 172.

67 *Kier* §172.

directly or indirectly relates in the relevant geographic area within the EEA." (Commission's guidelines, para 13).

- **the overall size of the undertaking in the jurisdiction concerned;**

In general this is not a circumstance taken into account. However, in the **Czech Republic**, the NCA may take into account the overall turnover in case the calculated fine does not have an adequate deterrent effect. In **Switzerland**, the overall size (i.e. the turnover) of the undertaking in Switzerland determines the basis for the maximum fine.

Side note EU: *Not taken into account*.

- **the overall size of the undertaking worldwide;**

In the vast majority (exception, e.g., **Switzerland**) the cap of the fine is set at 10 % of the global turnover. The overall size of each undertaking can be also assessed in order to ensure an effective deterrence of the fines to be imposed (see, e.g., **Italy**[68]). In the **Czech Republic**, the overall size may be also taken into account should the undertaking claim its payment incapability.

Side note EU: *"The final amount of the fine shall not, in any event, exceed 10 % of the total turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement, as laid down in Article 23(2) of Regulation No 1/2003." (Commission's guidelines, para 32)*

Furthermore, the Commission "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." (Commission's guidelines, para 30).

- **other measures of size or economic power such as profitability/assets;**

In general profitability/assets are not taken into account.

However,

- the NCA in the **Czech Republic** may request any information relating to the economic efficiency of the undertaking.
- in **Norway**, the undertaking's profits from the infringement shall be given particular consideration when considering the gravity of the infringement.
- in **Austria**, the Supreme Cartel Court[69], in increasing the fine of the court of first instance, referred to the profit achieved in the business concerned and the high

68 See, e.g., the 2010 *Retail sales of cosmetic products* case.

69 "Europay".

economic power of the parent companies. Also in **Sweden**, profitability could be taken into account to achieve a deterrent effect.

Side note EU: *With regard to specific increase due to deterrence "The Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount." (Commission's guidelines, para 31).*

- **the turnover of parent companies/subsidiary companies?**

In the vast majority the turnover of parent companies and subsidiaries is also assessed and considered when calculating the cap of the fine. In **Czech Republic**, also the turnover of parent companies/subsidiary may be taken into account should the undertaking claim its payment incapability. In **Sweden, Norway**, **Japan**[70] or **Italy** the financial position of the whole corporate group of which the undertaking is a part, can influence the calculation of the fine.

Side note EU: *The 10% cap in Art 23 (2) Reg 1/2003 takes into account the turnover of the whole group, i.e. the determination of the 10% cap for the overall fine imposed on subsidiaries involved in a cartel is based on the turnover of their respective ultimate parent companies.*

Is the size/economic power of the undertaking assessed at the time of the infringement or at the time of the fining decision? **What happens if the undertaking has grown or shrunk in size since the date of the infringement, or (by reason of acquisitions or divestments) forms part of a larger or smaller group of companies than it did at the time of the infringement?**

In general, as outlined above, with regard to the basic amount of the fine, the respective turnover of the undertaking is assessed at the time of the infringement to reflect the gravity of the infringement and the (then) effect on the market. By contrast, in relation to the 10% / 1 % cap, the last business year before the imposition of the fine is taken into account (with the exception of **Switzerland**, where the fine is calculated on the basis of the turnover realized by the undertaking in the relevant market in the three years preceding the decision).

However, also the undertaking's position on the market at or recently before the time of the fining is partially taken into account to ensure effective deterrence (see, e.g., **Czech Republic**, **Italy** and **Belgium**; with regard to the latter, in an abuse of dominance case[71] and the most recent cartel decision,[72] it was stated that the fines are proportionate, having regard *inter alia* to the turnover figures of the respective undertakings in the course of the past years).

70 With regard to Pecuniary penalties, in respect of which each of the listed factors may be taken into account as an extenuating circumstance.

71 Decision n° 2009-P/K-10 of 26 May 2009 (*Belgacom Mobile)* para. 368.

72 Decision n° 2010-I/O-11 of 20 May 2010 (S*teel radiators carte*l), para. 222.

As outlined above, in **Hungary**, there is no statutory guidance as to which year's turnover should be taken into account for setting the amount of the fine (within the 10% statutory threshold). The NCA decides on a case-to-case basis.

In **Italy**, in two cases[73] the NCA did not consider the fact that some companies had been acquired by a multinational during the course of the proceedings, but still considered these companies as small(er)-sized.

Side note EU: *While the 10% cap is based on the "preceding business year" previous to the decision, the Commission "normally" bases its calculation of the value of the sales on the "the sales made by the undertaking during the last full business year of its participation in the infringement"[74] (Commission's guidelines, para 13).*

In T-26,40/06, Trioplast, the CFI hold that the Commission was correct in taking 1996 as the reference year for assessing the seriousness of the infringement. As Trioplast Wittenheim reduced its activities significantly after 1997, its market share in 1996 reflected better its position in the market for industrial sacks than did its position in 2001, which was the last complete year of the infringement.

However, the Court did not accept 1996 as the reference year for Trioplast Industrier, as it was not yet present at that time on the market for industrial sacks. Moreover, since Trioplast Wittenheim's market share decreased significantly after 1996, that year is not indicative of the scope of the infringement which can be attributed to its new parent company, which acquired it only in January 1999. Accordingly, the Court annulled C.'s decision in so far as the fine imposed on Trioplast Industrier was based on its subsidiary's market share in 1996.]

Please describe any adjustment made for "failing firms" (i.e. cases where the undertaking concerned cannot pay the fine or cannot do so without causing damage to innocent third parties such as creditors or employees)? How does the body responsible for determining the amount of the fine deal with cases where a "failing firm" argument is made? Are there any cases where a competition fine has led to the insolvency of an undertaking?

In many jurisdictions concerned, the financial position of the corporate group of which the undertaking is part, is, in general, one of the circumstances that can influence the calculation of the fine. Therefore a failing firm defence could be considered in case where the fine would irretrievably jeopardize the economic viability of the undertaking / group concerned (see, e.g., **Norway**, **Sweden**, **Netherlands**, **Denmark**, **UK**, **France**, **Czech Republic**, **Germany**[75]).

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73 Decision no. 15393 of 26th April 2006 in the *Disinfectants products* case and decision no. 15329 of 26th April 2006 in the *Sapio producer of hydrogen/oxygen* case).

74 See also, e.g., T-375/06, Viega GmbH & Co. KG, Rz 77 ff.

75 However, in Germany a reduction of the fine is only being considered if the fined undertaking proves that it will not able to pay the fine in the long run without risking insolvency.

E.g. in **Sweden**[76], **Hungary** and **Japan** there were cases, where the level of the fine was lowered with reference to the fact that the undertaking concerned was insolvent.

In **Italy**, losses of the undertaking concerned have also resulted in a reduction of the fine. Undertakings involved in Italian proceedings and in financial difficulty may be also allowed to pay fines in instalments on the precondition that they suffered losses in the three years preceding that in which the fine is imposed.[77] On the other hand, the mere existence of a crisis in a particular industry is not sufficient.

In **France**, the NCA has published a questionnaire to be completed by firms pleading financial difficulties, which also includes a list of documents to be submitted with the request.

Side note EU: *"In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value." (Commission's guidelines, para 35).*

In the prestressing steel producer cartel, the Commission accepted three inability-to-pay applications and granted reductions of respectively 25%, 50% and 75% of the fine that would otherwise have been imposed. It had received 13 such applications, under the Commission's 2006 Fines Guidelines.

As outlined in its press release[78], when assessing a company's claim that it is unable to pay, the Commission looks at the financial statements for recent years and projections for the current and coming years; at ratios measuring the financial strength, profitability, solvency and liquidity and their relations with outside financial partners and with shareholders. The Commission also examines the social and economic context of each company and assesses whether a company's assets would be likely to lose significant value if it were to be liquidated as a result of the fine.

Is there any evidence that the level of fines has increased over recent years? If so, to what extent has that been the result of changes in legislative rules or published guidance, or has it resulted from a change in decision-making practice by the competition authority?

In the majority of countries, increases cannot be confirmed over recent years (see, e.g., **Switzerland**, **Norway**, **Czech Republic**). However, e.g., with regard to **Netherlands, Germany** and **France** increases can be verified. As regards Germany, higher fines (since

76 Case T 11660-03 (City Court), *SCA ./. Keyvent AB et al.*

77 As affirmed by *Tar del Lazio*, ruling no. 1240/2002 and 1239/2002).

78 IP/11/403.

2007) are attributed to an amended legal framework[79], the introduction of a leniency program and the establishment of a new Decision Division, dealing exclusively with hardcore cartels).

In countries like **Norway**, **Denmark** or **Czech Republic** there is at least an intention (based on amendments to the legal framework, or declared by the NCA) to increase fines.

In **Italy**, the general trend is towards a reduction of the amount of fines imposed. Furthermore, fines have been applied rarely as commitments are considered to be a useful tool to promptly re-establish competition on the market and to address antitrust concerns in a more effective manner than through the imposition of heavy fines (e.g., in 2009, 55% of the investigations opened by the IAA under Sections 2/3 of the IAL or 101/102 TFEU were concluded by acceptance of commitments proposed by the parties).

Side note EU: *Fines imposed (not adjusted for Court judgments) - period 2007 – 2011*[80] *Last change: ++14 July 2011++*

YEAR	TOTAL AMOUNT
2007	**3.313.427.700**
2008	**2.270.012.900**
2009	**1.540.651.400**
2010	**2.868.676.432**
2011	**315.200.000**

Are competition fines, and the procedures by which they are determined, consistent with international human rights standards (insofar as they apply to corporate bodies)?

For antitrust purposes the consistency with international human rights standards is substantially based on the legal assessment of the "nature" of antitrust proceedings. Based on the outcome of this assessment, the principles of Article 6 of the European Convention of Human Rights ("ECHR"), guaranteeing the right to a fair trial and due process[81], influence the rights of defence in antitrust proceedings.

However, independent from this assessment (i.e., the question whether antitrust procedures are "criminal law" proceedings, administrative proceedings including some criminal law aspects or strictly administrative proceedings), national antitrust procedures in general seem to be in line (or at least "broadly compatible") with international human rights standards (e.g.,

79 Japan (increase of basis rate with regard to surcharge in 2002, increase of maximum fine with regard to pecuniary penalty in 2005)) changes are legally based.

80 http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

81 E.g., reflected in the right of *presumption of innocence*, the principle of *in dubio pro reo*, and the right against *self-incrimination*.

Germany, **Czech Republic**, **Italy**, **Denmark**, **Netherlands**, **Sweden**, **Norway**, **Austria**[82], **Japan** with regard to pecuniary penalties, **Belgium**, **Hungary**).

This is often reasoned by the fact that first instance decisions can be appealed to independent courts / tribunals.[83]

However, there seems to be space for improvement with regard to the rights of defence of the undertakings within the proceeding in first instance, which are driven by the respective NCA's.

Some national reports refer in this regard to the in *dubio pro reo* principle, which is in contradiction to the NCA's burden of proof, which is often not as high as the standard used in criminal cases (e.g., **Hungary**).

E.g., in **Austria**, undertakings concerned do not have a right for access of file or a right to be heard in front of the NCA while, for example in **Sweden**, it is legally stated that the undertaking shall be given the opportunity to express its views on the draft summons application of the NCA. Sweden, on the other hand, mention that the time elapsing until a final judgment is rendered may be regarded as overly protracted (e.g., in the asphalt cartel case the final judgement was rendered in May 2009, while the proceedings were initiated before the City Court in 2003).

In **Netherlands**, there has been discussion on the prohibition for the accused infringer on hearing leniency applicants, which could be seen as an infringement of the principle of the right to hear and be heard (*audi alteram partem*). Also, publication of fines before the proceedings have been terminated at the highest authority was considered to be contrary to the presumption of innocence.

Also the lack of separation between investigation and prosecuting on the one hand and decision making on the other hand is mentioned (e.g., **Japan**, **Switzerland**) as being critical in terms of human rights standards.

Furthermore, the calculation of the fine was discussed under aspects of human rights standards:

- e.g., in the **UK**, the NCA, as highlighted above, changed its practice from calculating the starting point for penalties on the basis of turnover in the year prior to the end of the infringement to calculating it on the basis of turnover in the year prior to the decision.
- In Germany, the Higher Regional Court of Appeal held in 2009 that the current application of Sec. 81 (4) S. 2 ARC as a cap, according to which the fine may not be

82 So far, the Cartel Supreme Court (see, e.g., 16 Ok 5/10) always avoided to clarify whether the abstract threatening of a fine according to Sect 29 KartG results in a direct application of Art 6 ECMR.

83 See Norwegian report, referring to case law of the European Court of Human Rights ("ECtHR"), which states that in criminal proceedings there should "generally be a first instance tribunal which fully meets the requirements of Article 6 (…)" (*Jussila v Finland*, 23. November 2006).

higher than 10 % of the total turnover of the undertaking, is not consistent with German constitutional law. The court held, that the interpretation as cap (as interpreted by Community Law) would imply that the theoretical maximum level of the fine was unlimited, which would be in breach of the constitutional principle of clarity and definiteness as laid down in Basic Constitutional Law. Therefore, the court interprets Sec. 81 (4) ARC not as a cap, but as the maximum level of fining. The maximum level fine shall only be imposed for gross violations of competition law according to the Higher Regional Court of Appeal. However, the German NCA stated that it will not give up its present interpretation of Sec. 81 (4) ARC as a cap as for now. It has to be awaited, how the Federal Court of Justice will interpret the provision in question.

Side note EU: *"In the light of those criteria, I have little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article 81(1) EC falls under the 'criminal head' of Article 6 ECHR as progressively defined by the European Court of Human Rights.*

The prohibition and the possibility of imposing a fine are enshrined in primary and secondary legislation of general application; the offence involves engaging in conduct which is generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails a clear stigma; a fine of up to 10% of annual turnover is undoubtedly severe, and may even put an undertaking out of business; and the intention is explicitly to punish and deter, with no element of compensation for damage.

[…] I would none the less agree that, in the words of the judgment in Jussila, it 'differ[s] from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency'. That implies, in particular, that it may be compatible with Article 6(1) ECHR for criminal penalties to be imposed, in the first instance, not by an 'independent and impartial tribunal established by law' but by an administrative or non-judicial body which does not itself comply with the requirements of that provision, provided that the decision of that body is subject to subsequent control by a judicial body that has full jurisdiction and does comply with those requirements. Put another way, it must be clear that the available forms of appeal make it possible to remedy any deficiencies in the proceedings at first instance."[84]]

84 OPINION OF ADVOCATE GENERAL Sharpston, delivered on 10 February 2011 (1) Case C-272/09 P KME Germany AG, formerly KM Europa Metal AG, para 60 ff.

B.4. Comparison of Methodology used in competition matters versus other serious economic crimes or infringements

Are their any common rules to be applied to infringements of competition law and other serious economic crimes or infringements?

Besides general principles of procedural rules, which may be based on administrative law, general civil / criminal law[85] procedural rules or other specific national rules (e.g., the Non-Contentious Proceedings Act in **Austria**, the **German** Regulatory Offences Act or the **Swedish** "rules for actions not amenable to out-of-court settlement" *(Sw: indispositiva mål)*), competition law, especially but not only limited to substantive rules, is in general based on self contained rules.

This is reasoned by differences which relate to the persons to be fined (natural person or legal entity), the minimum and maximum of the fine (e.g. quantified amount or a certain percentage of the net amount of previous year's income), and/or the factors to be considered when setting the amount of the fine (see, e.g., report **Hungary**).

As examples for certain common principles, the **Czech Republic** refers to the general rule, following which a more serious offence absorbs any less serious offences, therefore an undertaking shall be liable only for the most serious offence committed. Based on its administrative nature, **Italy** refers to the seriousness of the infringement (see also **Switzerland**), the economic conditions of the perpetrators as well as actions taken by the latter in order to remedy/mitigate the consequences of the committed violation.

Is there any evidence that the level of fines imposed for competition infringements is out of proportion to the level of fines imposed for such serious economic crimes or infringements?

Due to reasons, which have been variously mentioned before, like the persons to be fined (natural person or legal entity) or the effect of infringements of competition law[86], the comparison of the level of fines, *in abstracto,* imposed for the infringement is considered of being difficult. See in this regard the UK's Competition Appeal Tribunal, following which a comparison is not legitimate as it is "*too far removed from the competition regime with which we are dealing to be helpful in assessing the reasonableness of the fines imposed in this or in any other infringement decision under the 1998 Act*".[87]

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85 E.g., Norway, Denmark.

86 E.g., economical harm in the form of artificially higher prices, less innovation and variety and inefficient production.

87 *Tomlinson* §§138.

However, national reports often refer to the high level of antitrust fines imposed (see, e.g., **Germany**, **Hungary** or **Sweden**). Though, the maximum amount of the fine (mostly 10% of the annual turnover) is only rarely met.

Based on general criteria to be compared, e.g. fines reaching the legal maximum cap, **Hungary** reports that national fines, which are imposed on companies falsely attributing health claims to food products, are much closer to the respective legal cap than antitrust fines imposed.

B.5. Other Material Aspects of the Rules governing the assessment of fines

To what, if any, extent is the competition authority, or a judicial tribunal hearing an appeal, required in determining the level of fines

- **to apply a consistent approach to different undertakings involved in the same infringement?**

Although that the respective fine must be individualized on each particular competitor, the setting of the fines must be generally based on a consistent approach (see, e.g. **Austria**):

In this respect, NCAs and courts have to respect general legal principles. One of these principles is the defendant's right of equal treatment, according to which it is prohibited to treat comparable situations differently and different situations identically unless such treatment is objectively justified (see report **Sweden, Norway, UK, Italy, Switzerland** and **the Netherlands**).

Furthermore, based on legal statues and guidelines, NCAs /courts are also required to apply a consistent approach to different undertakings involved in the same infringement e.g., with regard to application of fine, but also concerning deterrence which is dependent from the undertaking's size and results (see, e.g. **Japan** or **Hungary**, where the court took into account the aspects of deterrence and proportionality).

Side note EU: *In T-133/07 of 14 July 2011, Mitsubishi and others, the Court found that the Commission infringed the principle of equal treatment and annulled the fines imposed on Mitsubishi and Toshiba in so far as the Commission did not use the same reference year for Mitsubishi Electric and Toshiba (2001) and the European undertakings (2003).*

T-133/07, para 266 ff:

"However, each time the Commission decides to impose fines pursuant to competition law, it must observe general principles of law, which include the principle of equal treatment as interpreted by the Community Courts (Case T-59/02 Archer Daniels Midland v Commission [2006] ECR II-3627, paragraph 315)."

"According to settled case-law, the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case T-311/94 BPB de Eendracht v Commission [1998] ECR II-1129, paragraph 309, and the case-law cited)."

- **to have regard to the level of fines imposed for similar competition infringements in previous cases?**

As mentioned before, NCAs / courts do follow a general approach and general formulas of fine calculation (see 2.3. above), which must be often revisable on appeal (see, e.g., **Denmark**, **Switzerland**, **Austria**, **Japan** refers in this respect to the necessity of securing the legal stability and the equality of results). **Norway**, although not legally bound, follows its precedents in practice.

However, the reports in general refer to the fact that the NCAs / courts do have case-to-case discretion whether fines will be imposed (e.g., lacking negligence) or if yes, to which amount.

Therefore a direct application of previous cases may not be warranted. Each case must be assessed on its own merits (see, e.g., **Sweden**, **Germany**, **UK**, **Hungary, Italy**). A higher amount of the fine imposed compared to the previous practice, even in similar cases, is not deemed as contrary to the law per se (see **Czech Republic**),as fines are in general depending on the different circumstances in each case.

Side note EU: *"As regards the complaint relating to the arbitrary and excessive nature of the starting amounts and, in particular, the amount of EUR 40 million fixed for SGL, on the ground that that high amount is incompatible with the Commission's previous decision-making practice, it is sufficient to observe that the Commission has a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (Deutsch Bahn v Commission, cited at paragraph 157 above, paragraph 127). The fact that the Commission, in the past, imposed fines of a certain level for certain types of infringements does not mean that it is estopped from raising that level at any moment in order to ensure the implementation of Community competition policy (Musique diffusion française v Commission, cited at paragraph 144 above, paragraph 109) and to strengthen the deterrent effect of the fines (Case T-327/94 SCA Holding v Commission [1998] ECR II-1373, paragraph 179) (see paragraphs 191 and 192 above). It follows that the complaint relating to the change in practice as regards the level of the basic amounts must be rejected."*[88]

- **to have regard to the level of fines imposed on corporate bodies for other serious economic crimes or infringements (e.g. in the areas of fraud/environmental law/consumer protection)?**

88 T-252/01 *Tokai Carbon*, para 216.

In setting the amount of the antitrust fine, fines based on other (economic) infringements are not relevant / not taken into account (see, e.g., **Austria** where antitrust fines are considered of being "sui generis"[89]).

Also **Switzerland** / **Norway** refer to the independence in setting antitrust fines; however both reports mention the right to equality before the law which might serve as a basis for arguments with regard to fines imposed for other economic infringements.

Is it possible to appeal against the amount of the fine to an independent judicial tribunal? If so: -

With regard to all jurisdictions covered by the report, sooner or later, an appeal with regard the amount of the fine to an independent tribunal is possible, also with regard to the amount of the fine. As mentioned above, in **Austria, Denmark** and **Sweden** fines can be only imposed by independent judicial tribunals.

- **On what grounds may such an appeal be brought?**

In general, no specific reasons must be argued. It is sufficient to refer to errors of assessment (see **Japan**, pecuniary payments) and unlawfulness of the decision (e.g., **Germany**, **Denmark**, **Norway**, **UK, Hungary**). However, in some jurisdictions, e.g., in **Austria** or **Netherlands,** appeals can be brought on points of law.

Often, the nature of the grounds of appeal do not have to be named in the appeal (e.g., **Germany**) or it is sufficient to argue that rights have been violated (**Czech Republic**).

Sweden reports quite specific reasons (e.g., correctness/accuracy *(Sw: riktigheten)* of the judgment) **Switzerland** mentions, inter alia, exceeding or abuse of discretionary powers or inadequacy of the decision; **Italy** lists, inter alia, illogicality, lack of proportionality and inequity.

Side note EU: *Concerning decisions of the European Commission, pleadings may be lodged to the General Court on reasons of errors of law and errors of appreciation.*

- **What approach is adopted by the appeal tribunal (e.g. is the appeal confined to correcting errors of law or manifest errors of appreciation, or is it a redetermination of the fine *de novo*)?**

Independent tribunals by vast majority are entitled to re-determine the fine *de novo* (at least within the scope of the claims of the appeal). See eg **Sweden**, **Japan.**

In **Austria**, **Hungary** and the **Czech Republic** the court reviews the decision from the point of view of legality and does not re-assess it or correct errors of appreciation (partly the

89 16 Ok 4/07.

plaintiff must also explicitly indicate these points of unlawfulness). However, the respective courts may amend the decision of the NCAs. I.e., they are entitled to modify the amount of the fines.

Often the courts of appeal may also refer the case back to the cartel court or NCA, which is bound by the decision given on appeal (e.g., in **Austria** / **the Netherlands**).

Side note EU: *Art 261 TFEU: „The Court of Justice shall have unlimited jurisdiction to review decisions"*

However: "In areas where the Commission has maintained a discretion within set guidelines, for example as regards the uplift for duration, review of the legality of those assessments is limited to determining the absence of manifest error of assessment"[90]

- **Does the appeal tribunal have power to increase the amount of the fine, and, if so, when is that power used?**

Generally, the respective tribunals / courts may also increase the fine (see, e.g., **Germany**, **Denmark, Belgium, UK**).

In **Japan** (with regards to pecuniary penalties), the court may not sentence a more serious penalty than sentenced in the original decision if only the accused appeal.

In **Sweden** / **Austria**, it is the court which decides, but only on request of the NCA. The courts are bound by the maximum amount requested by the NCA, however the courts may impose a lower fine than requested, or even no fine at all.

In **Hungary**, based on general procedural rules, the court is bound by the parties' requests. Therefore, if the plaintiff does not dispute the legality of the amount of the fines, then the court is not entitled to investigate this amount *ex officio.*

In the **Czech Republic / Netherlands / Italy**, the fine may not be increased. **Netherlands** refers in this respect to the principle of *reformatio in peius* and **Italy** to the necessary correspondence between the demand and the judge's ruling.

Side note EU: *Increasing the fine on BASF from EUR34.97 to EUR35.024 million, the CFI in December 2007 increased a Commission fine for the first time (T-111/05, Choline Chloride)*

- **Is there a right of further appeal to a superior court, and if so on what grounds?**

Other than in **Austria**, there generally is a right of further appeal to a superior court. In **UK**, further appeals require the permission of the Competition Appeal Tribunal or the appeal court. Such an appeal is not limited to points of law.

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90 T-21/05, Chalkor, 19 May 2010, para 60-64.

With regards to reasons on which a further appeal may be submitted, it can be referred to

- Errors in law (**Hungary, Germany, Czech Republic, Belgium, Norway, Italy**)
- Violation of the Constitution or contradiction with judicial precedents of the Supreme Court (**Japan**),
- Error in fact (**Japan, Norway, Italy**)
- Faults / irregularity of proceedings.(**Norway, Czech Republic**, e.g. merits of the matter from which the administrative authority proceeded in the contested decision had no support in the documents),
- Illogicality, lack of proportionality and inequity (**Italy**).

Side note EU: *Under Article 256 (ex Article 225) of the Treaty on the Functioning of the European Union, appeals on judgments given by the General Court may be heard by the Court of Justice only if the appeal is on a point of law. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court may itself decide the case. Otherwise, the Court must refer the case back to the General Court, which is bound by the decision given on appeal.*

C. NORMATIVE QUESTIONS / RECOMMENDATIONS

What body should determine the level of fines (judicial/administrative)? If administrative, should the decision-maker be separate from the team that investigated the infringement?

National reports acknowledge both arguments in favour of courts (independence, higher *moral effect*) and NCAs (inter alia, due to expertise in competition law cases and promptness of enforcement) determining the fine. E.g., **Germany, Netherlands** (or a specialized court) and the **Czech Republic** explicitly support the imposition of fines by an administrative agency. With regard to the latter, the NCA's independence is named as an essential precondition.

National reports furthermore stress the importance of a fair trial in accordance with Article 6 ECHR. However these rights could be also guaranteed by allowing undertaking to (fully) appeal against the decisions of the NCA.[91]

There is broad consensus that the decision-maker should be separate from the team that investigated the infringement in order to avoid bias (**Hungary** mentions the principle of *contradictorium* (division of procedural functions)). However, factual reasons (e..g., understaffed authority, informal exchange anyway) often do not allow such a separation. The **UK** report mentions the possibility of the introduction of a prosecutorial system, i.e., to separate the substantive issue of whether there has been a competition law infringement (which the competition authority could investigate under an administrative system) and the level of penalty (which could be left to the Competition Appeal Tribunal to determine under a judicial system).

To what extent should the methodology used/level of fines be determined by, or be subject to the approval of, the legislature or politically-accountable government ministers, or should the level of fines and methodology used be left to independent competition authorities or courts?

There are different views on this matter:

On the one side, some national reports (e.g., **Sweden, Switzerland, Belgium, Japan**) agree that the determination of methodology used shall be subject to the formal legislative process, while Guidelines should (only) complete these legal criteria and take into account case law

91 See Hungarian report referring to the ECHR which has acknowledged the reason for the existence and the decision-making competence of an administrative decision-making body, when it stated that for efficiency reasons decisions regarding imposing fines in proceedings of a criminal nature can be granted to administrative authorities, if those who are concerned by the decision have the possibility for a legal remedy before a judicial tribunal that has competence for the full review, in which the guarantees of Article 6 of the Rome Convention fully prevail.

and therefore provide guidance and transparency in practice. This is mostly reasoned by the severity of the maximum penalty that can be imposed for antitrust infringements. Belgium also refers to the fact that the methodology for the calculation of the fine implies political choices (e.g. focus on deterrent effect vs. focus on actual harm to consumers).

On the other side, **Hungary** points out that the legal regulation is too rigid and not capable of regulating in detail the process of imposing a fine and the aspects to be considered. In **Germany's** / **Italy's** view it should be the the independent administrative body only determining the methodology / level of fines.

Other national reports (e.g., **Czech Republic, Switzerland, Austria**) suggest a "compromise": While, as the national reporters assume, the maximum level of fines shall be set by the legislation (approved by the legislature), any other methodology for "internal" use of the administrative body within the given competence of the administrative body could be determined by the administrative body itself.

Following this approach, **Norway** argues that the rules setting out the methodology used to calculate fines, as well as the level of fines, should be subject to approval by the legislature or politically-accountable government ministers. However, authorities should be provided with discretion to determine the level of fines in individual cases.

The Netherlands argue that it is not important which body sets the rules, as long as the rules are reasonable and in any event allow for a certain amount of discretion on the side of the competition authority.

What role should courts play in supervising the fining decisions of independent competition authorities? To what extent should they have regard to guidelines issued by competition authorities?

It is agreed that the ultimate decision as to the imposition and level of fines should rest with the courts, and not the authority that investigates competition law infringements.

Courts should furthermore be able to fully revise / review guidelines in practice with regard to conformity with legal norms, case law and statutes (e.g., **Czech Republic, Switzerland**). E.g., newly introduced criteria which are not covered by the legal framework should not be accepted by the reviewing court (**Sweden**), changes of the guideline's approach should be only possible with regard to future cases (**Hungary**). The courts itself should not be bound by the guidelines (e.g., **Japan, Germany, Austria**), but should also have the power to require the authority to change its practice (**France, the Netherlands**). On the other hand, according to **Italy**, courts should have regard to guidelines issued by competition authorities in reviewing the fining decisions of the latter, so as to ensure coherence of decisions as well as a higher degree of legal certainty.

With regard to the standard of review applied by courts when reviewing fining decisions, **Belgium** differentiates whether competition authority qualifies as an 'independent and impartial tribunal established by law' within the meaning of Article 6(1) ECHR or not.

In relation of the supervising courts role, **Norway** refers to the fact that they would advise - similar to that of the EU courts in relation to the European Commission's decisions – that the courts may also increase the amount originally set by the NCA.

To what extent should the level of fines reflect the size of the undertaking concerned? If so, how should "size" be measured? If turnover is to be used, what measure of turnover is appropriate (relevant market/overall turnover; year of infringement/year of fining decision)?

Again, most reports agree that based on the principle of deterrence, the economic power of the undertaking(s) concerned should be reflected in the fine imposed. One factor could be the overall turnover (used in most systems as a cap for the fine) and the turnover or market shares in the affected markets in relation to the size, including geographical size.

As **Belgium** indicates this general approach is backed up by a study published by the International Competition Network in 2008.[92] According to the study: "*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.*"[93]

An assessment based on turnover also has the benefit of being certain and readily identifiable from statutory accounts (as opposed to profitability, which has many different measures, see **UK**).

The relevant turnover should relate to the year(s) in which the infringement took place, ideally the relevant turnover or market shares should be that of the exact duration of the infringement (see **Sweden**). However, with regard to the maximum fine, the business year before the decision should and is decisive. **Switzerland** argues that in general (i.e. not only with regard to the maximum fine), the level of fines should depend on the turnover in the year of the finings decision as the proportionality of the fine may only be reached on the basis of the present size of the undertaking concerned.

Based on the principle of legal entity, **Hungary** points out that the possibility for the authority to link the maximum fine to the performance not only of the given undertaking, but of the whole group of undertakings (which is a possibility granted to the HCA under current Hungarian law), has to be used only exceptionally and subject to strict conditions. **The**

92 The study is available at http://www.internationalcompetitionnetwork.org/uploads/library/doc351.pdf. See also W. Wils, "Optimal Antitrust Fines: Theory and Practice", [2006] World Competition, Vol 29, n. 2.

93 International Competition Network, Cartels Working Group, "Setting of fines for cartels in ICN jurisdictions". Report to the 7th ICN Annual Conference, Kyoto, April 2008, p. 19.

Netherlands seem to agree by referring to the fact that some current guiding-elements in both EU and NL fining regulations in this respect are too rigid and thus bear the risk of resulting in unfair outcomes. For example, **the Netherlands** argue that the cap of 10% of overall turnover puts larger (e.g. conglomerate) companies at a disadvantage with respect to certain competitors that may be as large or larger than them in the specific market concerned, but smaller in overall size. The justification for this approach is doubtful at the least.

Hungary furthermore mentions fines should also reflect economic strength in order to sufficiently deter the infringer (specific deterrence).

Germany refers to the fact that turnover does not reflect profit margins and therefore suggest to concentrate on skimming off of extra profits (for reasons of deterrence, e.g an amount equating to 2 or 3 times the extra profits could be skimmed off). Similarly, the **French** report, while generally noting that turnover is a sensible reference value for purposes of fine calculation, points to a number of downsides of turnover-based fines. In particular, such fines do not really reflect the importance of the infringement, as turnover integrates the costs of external purchases which are beyond the control of the undertakings concerned, and may thus give rise to discriminatory results (eg of distributors versus manufacturers).

With regard to trade associations, **Italy** argues that their national methodology risks to excessively diminish the deterrent effect of fines imposed on trade associations (provided that *quantum* of fines is calculated on the total contributions paid by the association's members, which is usually low) while, on the other hand, the fining system adopted at EU level for associations of undertakings might be excessively onerous and could result in (at least) multinationals boycotting trade associations.

How should the seriousness of an infringement be judged? To what extent should the anti-competitive intentions of the undertaking or its employees be relevant?

As **Sweden** points out, the seriousness of an infringement should firstly be assessed on the basis of the type of infringement, *i.e.* whether it is an infringement by object or effect. Furthermore, it seems undisputed that certain kinds of infringements (e.g. price-fixing, market-sharing and output-limitation agreements) are more harmful than others (e.g. one-off exchange of commercially sensitive information).

Hungary suggests the gravity of the infringement is to be assessed in line with its potential or actual effect on competition and on the functioning of the markets (i.e., the harm caused by the infringement, see also **Belgium**).

However, for reasons of deterrence, before considering the seriousness, **Hungary** argues that at least some degree of culpability should be considered as a prerequisite for imposing a fine, as opposed to a factor for setting the amount of the fine. **Italy**, on the other side,

considers this factor as an aggravating circumstance rather than a condition for imposition of fines.

Only at a later stage, the undertaking's intention can be used as an aggravating / mitigating factor to set a justified amount of fine (see, e.g., **Japan**, **Germany**, **Austria, the Netherlands**). **Norway** argues the same way and refers to difficulties of attributing intention to undertakings and the difficulties distinguishing pro- from anti-competitive intentions. Similarly, the **French** report gives preference to assessing seriousness on the basis of effects, rather than on the basis of the intentions of the undertaking or its employees.

To what extent should the actual effects of the infringement be relevant? Should the amount of the fine exceed the harm caused (or likely to have been caused) by it, in order to provide suitable deterrence bearing in mind a low likelihood of detection?

It is generally accepted that – if assessable – the amount of the fine should exceed such harm caused (see, e.g., **Germany**, **Norway**, following **Japan** harm and fine should be balanced), at least with regard to hard core infringements. This is reasoned by an otherwise made cost/ benefit analysis and the general deterrent characteristic of a fine.

Some reports (**Switzerland**, **Italy** and **Austria**) refer to the fact that it is very difficult to measure the harm caused, therefore it seems almost impossible that the amount of a fine will ever match the harm caused. The **French** report however proposes criteria which could be used to approximate harm, namely the market power held by the infringers, the intensity of competition during the period of the infringement (eg by reference to the frequency of innovations, the evolution of prices and market shares, and the level of investment), and the characteristics of demand (harm is likely to be higher on markets characterized by a low price elasticity of demand and high cross-price elasticities between the infringers than in the inverse situation).

The extent is also dependent on the fact whether fines should have a deterrent or compensating character (**Belgium**). **Italy** argues in this respect that a fine based on harm would also overlap with private actions.

With regard to types of infringements (object / effect), infringements based on effect will be partly only fined if the actual effect is proven by the authority / court (see, e.g., **Sweden**). On the other side, it is sometimes no mitigating circumstance if the anticompetitive effects of an illegal behavior cannot be proved (e.g., **Hungary**). Some national reports (e.g., **Germany**. **Austria**) also argue that the lack of effects should be taken into account as a mitigating factor.

To what extent should the level of fines in competition cases be consistent with the level of fines imposed for other economic crimes/infringements (fraud/environmental law/consumer protection)?

Based on general principles which apply to any fines (eg., deterrence, proportionality) national rapporteurs stress the individuality of competition law and therefore also the independence of the methodology of competition law fines compared to other economic crimes and infringements.

In this regard, it is often referred to different natures of the fines concerned. E.g., in **Germany**, competition law fines are based on the Regulatory Offences Act, while most other economic crimes are punishable under criminal law.

In the **UK**, the Competition Appeal Tribunal had concluded that corporate manslaughter and health and safety cases were too far removed from competition law infringements to provide a meaningful comparison as regards the level of penalty (judgment Tomlinson).

To what extent should fines on an undertaking reflect its behavior after the infringement, such as co-operation/non-co-operation with the investigation/introduction of compliance measures/disciplinary action against employees involved/payment of compensation to victims?

Besides **Norway**, national reports in general suggest that cooperation after the infringement (outside any leniency) should be considered as a mitigating factor, at least if the cooperation results in tangible benefits (**Sweden**). **Belgium** refers in this regard again to the above mentioned study of the International Competition Network in 2008: "*the most accepted mitigating factor* [in the calculation of the amount of the fine] *is if the defendant shows willingness of cooperation. In different forms, this is taken into consideration in 12 fining policies*".[94]

Following this approach, also voluntary payments to victims, before the launch of a damage claim, could be considered as a mitigating factor (e.g., in **Hungary** payments were, in fact, considered of reducing the fine).

On the other hand the simple fact that the undertaking introduced a compliance program is, by vast majority, not considered sufficient to be reflected in the fine imposed (see, e.g., **Hungary**). Concerning compliance programs, **Germany** differentiates between compliance programs after the infringement (which should not be considered as an extenuating circumstance) and extensive compliance programs at the time of the infringement (which should be taken into account positively). By contrast, the **French** report argues that the adoption of compliance measures should be taken into account, as such measures decrease

94 Id., p. 24.

the likelihood of future infringements both on the part of the undertaking itself and, by contributing to a culture of competition, in the economy as a whole.

With regard to the issue of "rough employees", i.e., employees who act in violation of compliance programs, **UK** mentions the fact that in UK, at least in theory, an individual could be prosecuted for the cartel offence whilst the company might not be fined for the infringement of competition law.

Disciplinary / legal measures against employees are considered as being difficult, at least if they are introduced only after the infringement was disclosed by the authority (see **Switzerland**).

If competition fines are now high compared to fines for other economic crimes/infringements, is there any factor (such as the relative difficulty of detection) that might justify that difference, or is the difference not justifiable?

In general, the high amount of competition law fines is justified by the (potential) harm to consumer welfare. Or, in other words, with lower prices, better production, wider choice and greater efficiency[95] the benefits of competition are so essential that higher fines, if reasoned on a proofed infringement, may be justified. Though, **Norway** refers to the risk that an "overinclusive" application of the substantive competition rules combined with high fines may deter pro-competitive behaviour. For instance, an overly broad interpretation of the notion of an agreement with an anti-competitive "object", or excessive formalism when applying the prohibition on abuse of dominance, may, when combined with high fines, have a chilling effect on competition

The factor that cartels may be difficult to detect is partly not regarded as a reason supporting high fines, but should be better used to provide a strong incentive scheme, in the form of a leniency program (**Sweden**). However, Belgium argues that the higher the expected fine, the more appealing it is for undertakings involved to apply for leniency. Additionally, e.g. **Czech Republic** points out that due to difficulty of detection a higher fine may be justified in the field of competition law. **Hungary** agrees and compares detected competition law fines with other economic infringements which occur in the public domain, e.g., misleading advertisement cases).

Belgium refers to the fact that there is often a linear relationship between the effectiveness of rules on the one hand, and the sanctions for infringement of these rules and the likelihood of being caught on the other hand.[96]

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95 See Whish, Competition Law, Sixth Edition, p 749 ff.

96 P. Wytinck, "Sancties, risico's en kosten bij overtredingen van het mededingingsrecht", in Gericht op de mededinging / Consacré à la concurrence. In honorem Bernard van de Walle de Ghelcke, Maklu, 2011, p. 137.

Furthermore, in referring to the factor of deterrence the former European Commissioner for Competition Policy Kroes is quoted in the Belgium report: "*by cracking down hard on one cartel, we estimate that we stop another five*".[97] In this regard it is further referred to a 2007 study commissioned by the OFT that estimated that for every cartel discovered there were at least five others that were abandoned or stalled before they could do real damage.[98]

97 N. Kroes, "Competition, the crisis and the road to recovery", Address at Ecomoic Club of Toronto, Toronto, 30 March 2009, SPEECH/09/152, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/152&format=HTML&aged=1&language=EN&guiLanguage=en.

98 "The deterrent effect of competition enforcement by the OFT", A report prepared for the OFT by Deloitte, November 2007, p. 8. Available at http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf.

D. STATISTICS

Top 45 all jurisdictions covered, all infringements					
no.	**amount (EURO)**	**type of infringement**	**country**	**Concerned companies/ special name of infringement**	**year**
1	**R$ 2.5bn (appr EUR 1.07bn)**	cartel	Brazil	Gas Cartel/ White Martins gases Industriais Ltda., Air Liquid Brasil Ltda., others.	2010
2	**717,0 m**	cartel	Germany	-	2003
3	**575.4 m**	cartel	France	11 firms of the steel industry	2008
4	**534 m**	cartel	France	Orange France,SFR and Bouygues Telecom (mobile telephony market)	2005
5	**435,0 m**	cartel	Germany	-	2007
6	**385. 3**	cartel	France	13 banks (interbank fees for processing checks)	2010
7	**361,2 m**	cartel	Italy	RC Auto	2000
8	**314,0 m**	cartel	Germany	-	2008
9	**301,0 m**	cartel	Italy	Airport fuel supplies	2006
10	**300,0 m**	cartel	Germany	-	2009
11	**290,0 m**	abuse of dominance	Italy	ENI- TransTunisian Pipeline	2006
12	**275,0 m**	abuse of dominance	Switzerland	Swisscom Mobile AG	2007 (annulled on appeal)
13	**266,0 m**	cartel	Germany	-	2010
14	**261,6 m**	cartel	UK	Retail	2010
15	**249,0 m**	cartel	Italy	Fuel supply agreements	2000
16	**201,0 m**	abuse of dominance	Switzerland	Swisscome Mobile AG	2007
17	**152,0 m**	abuse of dominance	Italy	Telecom Italia	2004
18	**151,4 m**	Abuse of dominance	Brazil	Companhia de Bebida das Américas-Ambev	2009
19	**95,0 m**	merger control	Italy	Emilcarta-Agrifood Machinery	2004
20	**94 m**	Cartel	France	5 temporary employment agencies (market sharing)	2009
21	**93,6 m**	cartel	Netherlands	Groundwork, road and hydraulic engineering	2005
22	**88 m**	cartel	Netherlands	Mobile operators	2002
23	**81,6 m**	cartel	Netherlands	Flour	2010
24	**81,2 m**	cartel	Italy	Retail sales of cosmetic products	2010
25	**80 m**	Abuse of	France	France Telecom	2005

		dominance		(ADSL Internet Broadband access)	
26	**75,4 m**	cartel	Austria	Lift / elevator cartel	2008
27	**66,3 m**	abuse of dominance	Belgium	Belgacom Mobile	2009
28	**63 m**	Cartel	France	Orange Caraïbe and France Telecom (telephony in French overseas departments)	2009
29	**63 m**	Abuse of dominance	France	Orange Caraïbe et France Telecom (telephony in French overseas departments)	2009
30	**59,5 m**	abuse of dominance	Italy	Infostrada-Telecom Italia ADSL technology	2001
31	**52,7 m**	Abuse of dominance	France	8 firms in the sector of Road signs	2010
32	**48,0 m**	cartel	Sweden	NCC AB, a.o.	2009
33	**45 m**	Abuse of dominance	France	France Telecom (high-speed Internet access)	2007
34	**40 m**	cartel	Netherlands	Installation sector	2005
35	**35,4 m**	cartel	Czech Republic	Alstom (Société Anonym), Areva T&D Hitachi	2007
36	**30,2**	abuse of dominance	Netherlands	Interpay	2004
37	**29,7**	cartel	Netherlands	Bicycle producers	2004
38	**28,0 m**	Cartel	Hungary	Strabag, Betonút, Hídépítő, DEBMÚT, EGÚT	2004
39	**27,6 m**	Abuse of dominance	France	France Telecom (telecommunications in overseas departments)	2009
40	**19 m**	Cartel	Netherlands	Wegener	2010
41	**18,4 m**	Cartel	Netherlands	-	2006
42	**15,9 m**	cartel	Czech Republic	Ceskomoravska SS	2004
43	**15,8 m**	abuse of dominance	UK	Ofgem decision	2008
43	**15,8 m**	merger control	Italy	Editione Holding / Autostra	2002

D.1. Austria

Top 5 Jurisdiction / cartel / Austria			
no.	**amount (EURO)**	**participants / special name of cartel**	**year**
1	75.400.000	Aufzugs- und Fahrtreppenkartell	2008
2	7.000.000	PayLife Bank (Europay Austria)	2007
3	1.900.000	Industriechemikalienkartell	2009
4	1.500.000	Druckchemikalienkartell	2010
5	80.000	Grazer Fahrstuhlkartell	2005/2006

Top 5 Jurisdiction / abuse of dominance / Austria			
no.	**amount (EURO)**	**company / special name of abuse**	**year**
1	1.500.000	Telekom Austria	2009
2	500.000	Telekom Austria (Titak / Minimumtarif)	2004
3	150.000	Constantin (Filmverleih)	2006

Top 5 Jurisdiction / merger control / Austria			
no.	**amount (EURO)**	**participants / special name**	**year**
1	1.500.000	Lenzing / Tencel	2004
2	200.000	Private Equity undertaking	2011
3	140.000	SPZ / Gmundner Zement	2006
4	70.000	AVAG, Opel Beyschlag	2006

D.2. Belgium

Top 5 Jurisdiction / cartel / Belgium			
no.	**amount (EURO)**	**participants / special name of cartel**	**year**
1	3.540.000	Steel radiators cartel	2010
2	487.755	Plasticiser (BBP) cartel	2008
3	10.000	Nationale Unie van Belgische Exporteurs van Land- an Tuinbouwpoducten v. Vennootschap Mechelse Verlingen et al.	2002
4	6.990	Association of Belgian Driving Schools	2008
5	1.000	Association Sportive Automoblie Francophone	2000

Top 5 Jurisdiction / abuse of dominance / Belgium			
no.	**amount (EURO)**	**company / special name abuse**	**year**
1	66.300.000	Begacom Moblie (BMB)	2009

D.3. Brazil

Top 5 Jurisdiction / Brazil			
no.	**amount (EURO)**	**participants / nature of infringement**	**year**
1	Approx EUR 1,07bn	Gas Cartel/ White Martins gases Industriais Ltda., Air Liquid Brasil Ltda., others. Cartel: collusion between competitors to divide the market and eliminate competition (market sharing)	2010
2	Approx EUR 151,4 Mio	Companhia de Bebida das Américas - Ambev Abuse of dominance	2009
3	2% of the company's turnover	Shopping Iguatemi Abuse of dominance	2008
4	12% of the company's turnover	Cia. Ultragaz S.A., Copagaz Distribuidora de Gás Ltda., Minasgás S.A. Distribuidora de Gás, Nacional Gás Butano Distribuidora Ltda.,Supergasbrás Distribuidora de Gás Ltda., others. Cartel: price fixing	2008

D.4. Czech Republic

Top 5 Jurisdiction / cartel / Czech Republic			
no.	**amount (EURO)**	**participants / special name of cartel**	**year**
1	35.400.000	Alstom (Société Anonym) Areva T&D Hitachi	2007
2	15.900.000	Ceskomoravska SS	2004
3	9.000.000	AGIP Praha, a.o.	2001
4	4.100.000	Delta a.o.	2005
5	4.100.000	Alliance UniChem CZ, GEHE	2006

Top 5 Jurisdiction / abuse of dominance /Czech Republic			
no.	**amount (EURO)**	**company / special name of abuse**	**year**
1	13.500.000	RWE Transgas	2006
2	10.100.000	Ceske darhy, a.s.	2008
3	3.100.000	Cesky Telecom, a.s.	2005
4	2.500.000	Cesky Telecom, a.s.	2003
5	1.900.000	Skoda Auto a.s.	2005

D.5. Denmark

Top 5 Jurisdiction / cartel / Denmark			
no.	**amount (EURO)**	**participants / special name of cartel**	**year**
1	3.300.000	El-kartellet	2001
2	533.000	Lokalbankerne	2008
3	266.000	Hempel	2007
4	173.000	Louis Poulsen Lighting A/S	2011
5	146.000	Valsmöllen A/S	2008

D.6. France

Top 5 Jurisdiction / cartel / France			
No.	**Amount (EURO)**	**Participants / Special name of cartel**	**year**
1	575. 454. 500	11 firms of the steel industry	2008
2	534. 000. 000	Orange France,SFR and Bouygues Telecom (mobile telephony market)	2005
3	385. 372. 000	13 banks (interbank fees for processing checks)	2010
4	94. 000. 000	5 temporary employment agencies (market sharing)	2009
5	63. 000. 000	Orange Caraïbe and France Telecom (telephony in French overseas departments)	2009

Top 5 Jurisdiction / abuse of dominance / France			
No.	**Amount (EURO)**	**Participants / Special name of abuse**	**year**
1	80. 000. 000	France Telecom (ADSL Internet Broadband access)	2005
2	63. 000. 000	Orange Caraïbe et France Telecom (telephony in French overseas departments)	2009
3	52. 712. 000	8 firms in the sector of Road signs	2010
4	45. 000. 000	France Telecom (high-speed Internet access)	2007
5	27. 600. 000	France Telecom (telecommunications in overseas departments)	2009

D.7 Germany

Top 5 Jurisdiction / cartel / Germany			
no.	**amount (EURO)**	**participants / special name of cartel**	**year**
1	717 m	-	2003
2	435 m	-	2007
3	314 m	-	2008
4	300 m	-	2009
5	266 m	-	2010

D.8. Hungary

Top 5 Jurisdiction / cartel / Hungary			
no.	**amount (EURO)**	**participants / special name of cartel**	**year**
1	28,0 m	Strabag, Betonút, Hídépítő, DEBMÚT, EGÚT, et al.	2004
2	10,3 m	Strabag, EGÚT, Colas, et al	2009
3	6,8 m	Interchange fee case (card issuing banks, MasterCard, Visa card companies)	2009
4	5,7 m	SAP Kft., IBM Kft., SynergonInformatikai Rendszerekt, et al.	2006
5	5,3 m	Strabag, Betonút, Adeptus, EGÚT, Hidepitő et al.	2005

Top 5 Jurisdiction / abuse of dominance / Hungary			
no.	**amount (EURO)**	**company / special name of abuse**	**year**
1	9.700.000	MÁV	2006
2	278.884	MATÁV	2004
3	268.595	TITÁSZ	2002
4	185.950	DÉMÁSZ	2002
5	119.521	ViDaNet	2004

D.9. Italy

Top 5 Jurisdiction / cartel / Italy			
no.	**amount (EURO)**	**participants / special name of cartel**	**year**
1	361,2 m	RC Auto	2000
2	301,0 m	Airport fuel supplies	2006
3	249,0 m	Fuel supply agreements	2000
4	81,2 m	Retail sales of cosmetic products	2010
5	70,0 m	tobacco brands	2003

Top 5 Jurisdiction / abuse of dominance / Italy			
no.	**amount (EURO)**	**company / special name of abuse**	**year**
1	290,0 m	ENI- TransTunisian Pipeline	2006
2	152,0 m	Telecom Italia	2004
3	59,5 m	Infostrada-Telecom Italia ADSL technology	2001
4	26,8 m	Assoviaggi/ Alitalia	2001
5	22,0 m	Tele2/TIM-Vodafone-Wind	2007

Top 5 Jurisdiction / merger control / Italy			
no.	**amount (EURO)**	**participants / special name of merger**	**year**
1	95,0 m	Emilcarta-Agrifood Machinery	2004
2	15,8 m	Edizone Holding /Autostra	2002
3	11,2 m	Parmalat / Eurolat	2005
4	6,8 m	Edizone Holding /Autostra	2004
5	4,5 m	Blugas-Snam	2004

D.10. Japan

a) surcharge (The table below shows the amount of surcharges in the last 10 years. Obviously the amount of surcharge per order has been increasing in the last 10 years.)

Year of Decision	Amount of surcharge (100 million yen)	Number of payment orders of surcharge	Amount / order (100 million yen)	Infringement (100 million yen)	
				Bid-rigging	Price-fixing cartels, etc
2001	21.9	248	0.088		
2002	43.3	561	0.077		
2003	38.7	468	0.082	38.3	0.4
2004	115.5	219	0.527	34.5	77.0
2005	188.7	399	0.472	188.0	0.7
2006	92.7	158	0.586	63.8	28.9
2007	112.9	162	0.696	73.7	39.2
2008	270.3	87	3.106	28.9	241.4
2009	360.7	106	3.402	47.1	313.6
2010	720.8	156	4.620		

b) Pecuniary penalty (the table below is the list of the cases where pecuniary penalties were imposed on companies in the last 10 years. Only bid-rigging cases were accused).

Year of Decision	Name of the Case/ Parties Names	Amount of Fine (100 million yen)		Type of Infringement
		Total amount/ number of companies	Maximum amount	
2004	Cosmo Oil Co., Ltd.	2.73 / 9	0.8	Bid-rigging
2004	Aichi Tokei Denki Co.,ltd.	0.5 / 2	0.3	Bid-rigging
2004	Kimmon Manufacturing Co.,ltd.	0.2 / 1	0.2	Bid-rigging
2007	JFE Engineering Corporation	1.2 / 1	1.2	Bid-rigging
2007	Miyaji Iron Works Co.,	13.2 / 3	0.6	Bid-rigging
2007	Obayashi Corporation	70 / 5	2	Bid-rigging
2007	Ringyo Doboku Consultants	20 / 3	0.9	Bid-rigging

D.11. Netherlands

*Please be aware that several of the mentioned amounts are initial fines and have been reduced/withdrawn afterwards, or ar still subject to appeals

Top 5 Jurisdiction / cartel / Netherlands			
no.	**initial amount (EURO)**	**participants / special name of cartel**	**year**
1	93,6 m	Groundwork, road and hydraulic engineering (*GWW*)	2005
2	88 m	Mobile operators	2002
3	81,6 m	Flour	2010
4	40 m	Installation sector	2005
5	29,7 m	Bicycle producers	2004

Top 5 Jurisdiction / abuse of dominance / Netherlands			
no.	**initial amount (EURO)**	**company / special name of abuse**	**year**
1	30,2 m	Interpay	2004
2	2,6 m	CR Delta	2003
3	0,4 m	Associations of psychologists	2004

Top 5 Jurisdiction / abuse of merger control / Netherlands			
no.	**initial amount (EURO)**	**participants / special name of merger**	**year**
1	19 m	Wegener	2010
2	2,4	Sofiprotéol and Bunge	2010
3	2 m	Amlin and the Dutch State	2010
4	0,7 m	Sibco and Trafigura	2010
5	0,6 m	NPM Capital and Driesprong	2010

D.12. Norway[99]

Top 5 Jurisdiction / cartel / Norway			
no.	**amount (EURO)**	**participants / special name of cartel**	**year**
1	approx 5.9 m (on appeal)	V2007-2, Tine BA	2007
2	212.000	V2008-4, Borregaard	2008
3	172.000	V2008-5, Brenntag	2008

99 Norway enacted a new competition act in 2004. The table is based on the fines imposed under the Competition Act of 2004.

Top 5 Jurisdiction / abuse of dominance / Norway			
no.	**amount (EURO)**	**participants / special name of cartel**	**year**
1	approx 2.7 m	V-2005-9, SAS	2009

D.13. Sweden

Top 5 Jurisdiction / cartel / Sweden			
no.	**amount (EURO)**	**participants / special name of cartel**	**year**
1	48.000.000	NCC AB, a.o.	2009
2	12.000.000	Norsk Hydro AB, a.o.	2005
3	2.000.000	Bil Bengtsson, a.o.	2008
4	1.200.000	Uponor Sverige, a.o.	2003
5	16.483	YIT Building System AB och Keyvent AB	2005

Top 5 Jurisdiction / abuse of dominance / Sweden			
no.	**amount (EURO)**	**company / special name of abuse**	**year**
1	102.150	Telia Aktiebolag	2001

D.14. Switzerland

Top 5 Jurisdiction / cartel / Switzerland			
no.	**amount (EURO, based on an EURO/CHF exchange rate of 1/1.20))**	**participants / special name of cartel**	**year**
1	6.3m	Various companies / Baubeschläge für Fenster und Fenstertüren	2010 (appeal pending)
2	4.75m	Bayer, Eli Lilly and Pfizer	2009 (appeal pending)
3	4m	Gaba and Gebro	2009 (appeal pending)
4	329.166	Various companies / Elektroinstallationsbetriebe Bern	2009
5	140.833	One company / another participant was granted full immunity: Heiz-, Kühl- und Sanitäranlagen	2010

Top 5 Jurisdiction / abuse of dominance / Switzerland			
no.	**Amount (EURO, based on an EURO/CHF exchange rate of 1/1.20)**	**company / special name of abuse**	**year**
1	201m	Swisscom (regarding mobile termination fees)	2007 (annulled on appeal)
2	183m	Swisscom (regarding ADSL)	2009 (appeal pending)
3	5.8m	Six Group	2010 (appeal pending)
4	2.1m	Publigroupe	2007 (appeal pending)
5	84.166	Flughafen Zürich	2006

D.15. UK

Top 5 Jurisdiction / cartel / United Kingdom			
no.	**amount (EURO)**	**participants / special name of cartel**	**year**
1	261,6 m	Retail	2010
2	146,8 m	construction firms	2009
3	44,5 m	recruitment agencies	2009
4	27,8 m	Argos and Littlewoods	2003
5	22,1 m	Umbro, Allsportts, Blacks, Sports Connection, JJB Sports Manchester United, Sportsetaril, Sports Soccer, FA 2003	2003

Top 5 Jurisdiction / abuse of dominance / United Kingdom			
no.	**amount (EURO)**	**company / special name of abuse**	**year**
1	15,8 m	Ofgem decision	2008
2	6,1 m	EWS	2006
3	4,2 m	Genzym	2003
4	3,6 m	Napp	2001
5	1,6 m	Aberdeen Journals	2002

D.16. EU[100]

Ten highest cartel fines per case (since 1969)
Last change: ++14 July 2011++

Amount in €*	Case name	Year
1.383.896.000	**Car Glass**	**2008**
1.106.000.000	**Gas**	**2009**
832.422.250	**Elevators and escalators**	**2007**
799.445.000	**Airfreight**	**2010**
790.515.000	**Vitamins**	**2001**
676.011.400	**Candle Waxes**	**2008**
648.925.000	**LCD**	**2010**
622.250.782	**Bathroom fittings**	**2010**
539.185.000	**Gas insulated switchgear**	**2007**
486.900.000	**Flat Glass**	**2007**

Ten highest cartel fines per undertaking (since 1969)
Last change: ++14 July 2011++

Amount in €*	Case name	Undertaking	Year
896.000.000	**Car Glass**	Saint Gobain	**2008**
553.000.000	**Gas**	E.ON	**2009**
553.000.000	**Gas**	GDF Suez	**2009**
462.000.000	**Vitamins**	F. Hoffmann-La Roche AG	**2001**
396.562.500	**Gas insulated switchgear**	Siemens AG	**2007**
370.000.000	**Car Glass**	Pilkington	**2008**
326.091.196	**Bathroom fittings**	Ideal Standard	**2010**
319.779.900	**Elevators and escalators**	ThyssenKrupp	**2007**
318.200.000	**Candle Waxes**	Sasol Ltd	**2008**
310.080.000	**Airfreight**	Air France / KLM	**2010**

* Amounts adjusted for changes following judgments of the Courts (General Court and European Court of Justice).

100 http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.