

# Fine setting: Considerations and methodologies

ICN CARTEL WORKSHOP, MADRID

MINI PLENARY 9

5 OCTOBER 2016

# Australian approach to antitrust fines

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# Statutory framework

## POWER AND LIMITS

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### Statutory power

- Cartels can be prosecuted as a civil contravention and/or criminal offence – fines are available for both
- ACCC and DPP do not have administrative power to impose fines – only Courts can impose fines on application of the ACCC or DPP

### Maximum penalties

	Corporations	Individuals
<b>Cartel conduct (civil)</b>	Greater of (per contravention): <ul style="list-style-type: none"><li>• \$10 million</li><li>• 3 times the "gain" from the conduct, or</li><li>• 10% of annual turnover of the body corporate</li></ul>	Up to \$500,000, per contravention
<b>Cartel conduct (criminal)</b>	As above	Up to \$360,000, per contravention and up to 10 years imprisonment

# The "penalty factors"

## APPLICATION OF JUDICIAL DISCRETION

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- Fine setting in Australia is a largely discretionary process

### Relevant factors

Nature and extent of the contravening conduct	Degree of market power of company	Whether the company has shown a disposition to cooperate
Amount of loss or damage caused by the conduct	Deliberateness of the contravention and the period over which the conduct extended	Whether the company has engaged in similar conduct in the past
Circumstances in which the conduct took place	Whether the conduct arose out of the conduct of senior management	Financial position of the company
Size of the contravening company	Whether the contravening company has a culture conducive to compliance	Deterrent effect of the proposed penalty

# Role of settlement in penalties

## CIVIL SETTLEMENT LIKELY TO BE ACCEPTABLE

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### Immunity and Co-operation Policy

- ACCC has an Immunity and Co-operation Policy for parties who have been involved in a cartel

### Civil proceedings

- Parties may present the Court with agreed facts and joint submissions on the appropriate penalty – but the Court is not a mere rubber stamp – it will assess whether the proposed penalty is within the appropriate range

### Criminal proceedings

- Parties may not make any submissions on the appropriate penalty – this is a matter for the Court and the exercise of its "instinctive synthesis"

# Trends

## PUSH TO INCREASE PENALTIES

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### Amendments to maximum penalties

- 3 x the gain and 10% of annual turnover introduced about 10 years ago

### Highest penalties for cartel conduct to date

- In a single case – \$36 million in cardboard box cartel in 2007
- For a single cartel – in excess of \$100 million for air cargo cartel, 2008 – 2012

### Significant push for higher penalties by ACCC

- The ACCC has actively campaigned for higher penalties to be imposed for contraventions of Australian competition law, arguing that current levels do not have the necessary deterrent effect



# Basic fining principles of the European Commission

ICN Cartel workshop in Madrid

5 October 2016

**Gerald Miersch**

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\*The views expressed are personal and do not bind  
the Commission



## Basic fining principles of the European Commission

- European Commission imposes fines on companies
- Scrutiny by European Courts
- Basic criteria spelt out in law:
  - Gravity and duration of infringement
  - Fine is capped at 10% of total turnover
- Fining guidelines provide further explanations



## Basic fining principles of the European Commission

Starting point: cartelised sales

- Value of sales per participant
  - Gravity multiplier of 15-30%
  - Duration fully counts
  - "Entry fee"
- > Basic amount



## Basic fining principles of the European Commission

- Adjustments
  - Aggravating circumstances
  - Mitigating circumstances
  - Deterrence multiplier
- > Adjusted basic amount
- 10%-cap
- Leniency reductions
- Reduction in case of settlement (10%)
- Inability to Pay reductions

# Administrative Surcharge and Criminal Fine System in Japan

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ICN Cartel Workshop  
Mini Plenary 9 “Fine setting: considerations and methodologies”  
October 5, 2016

# Overview of Fine System in Japan

## Administrative Surcharges

- JFTC determines the amount through administrative procedure and imposes on Companies (Not on Individuals) for deterrence, disgorgement, and sanction
- Calculation formula: Sum of surcharges = Sales amounts in question multiplied by Surcharge calculation rate (see the next page for detail)
- No limits as to the maximum amount
- Immunity and reductions up to five companies under leniency program

## Criminal Fines

- Court determines the amount through criminal procedure and imposes on Companies and/or Individuals for deterrence, and punishment
- JFTC's exclusive authority to bring an accusation of vicious and serious cartels
- Unlike administrative fine, court determines appropriate level of fines based on the totality of the circumstances (No use of calculation formula)
- Not more than five million yen for individuals, not more than five hundreds million yen for companies

# Surcharge Calculation Formula

## Cartels and Bid-riggings

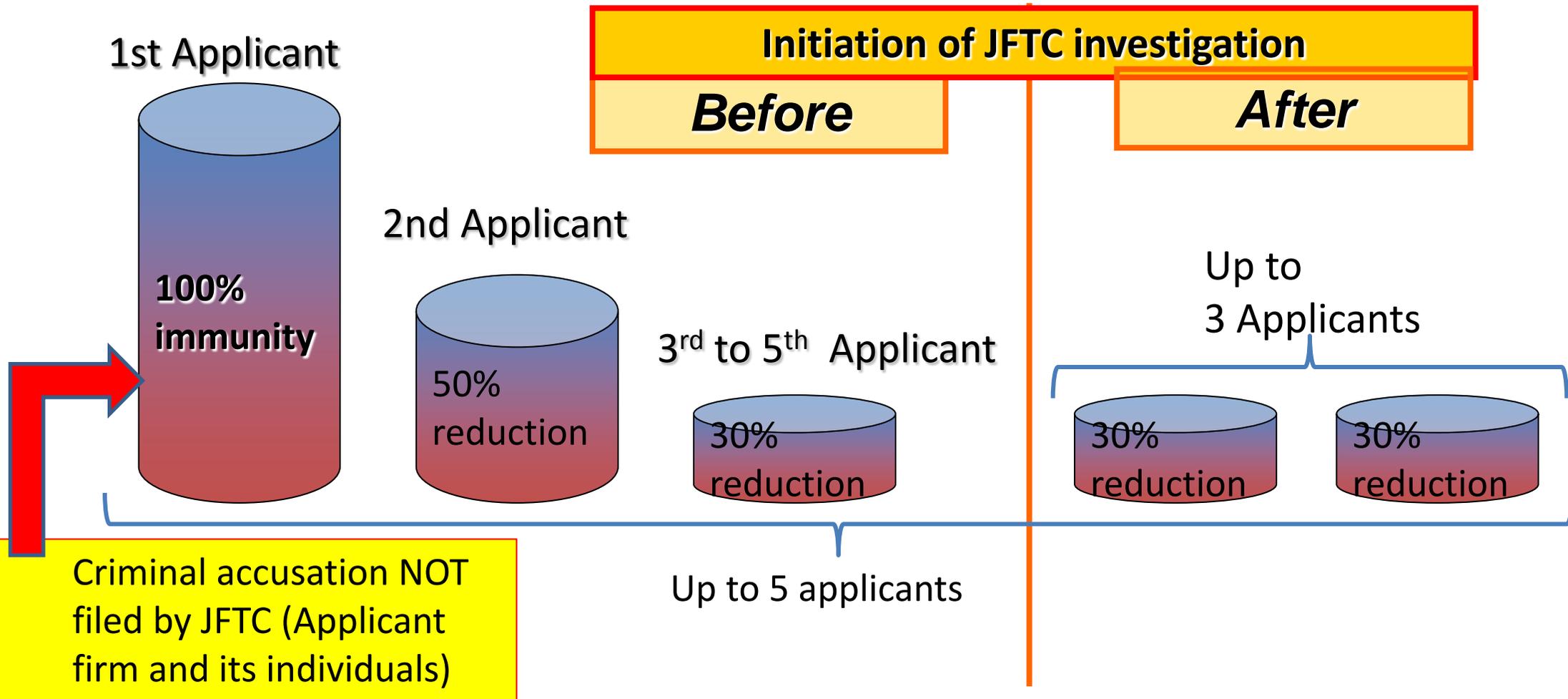
$$\begin{array}{|c|} \hline \text{Surcharge} \\ \text{calculation} \\ \text{rates} \\ \hline \end{array} \times \begin{array}{|c|} \hline \text{Sales amounts of products in question} \\ \text{during the period of violation} \\ \text{(3 years at a maximum)} \\ \hline \end{array} = \begin{array}{|c|} \hline \text{Sum of surcharges} \\ \hline \end{array}$$

	Normal	Repeated violation/Leading entrepreneur	Early termination
Manufacturing	10% (4%)	15%(6%)	8%(3.2%)
Retail	3% (1.2%)	4.5% (1.8%)	2.4%(1%)
Wholesale	2% (1%)	3% (1.5%)	1.6%(.8%)

\*Rates in case of medium and small enterprises in parenthesis

- “Early termination” means that the period of illegal acts is less than 2 years, and such acts are discontinued not later than one month before the commencement of investigations.
- “Repeated violation” means cases where surcharge payment orders have been given during the period of 10 years before the commencement date of investigation.
- “Leading entrepreneur” means entrepreneur who plays a leading role, such as “organizer” in bid-rigging, cartel, etc.

# Overview of Leniency Program in Japan



- The amount of surcharge to be reduced is stipulated and decided only by the timing/order of application, irrespective of
  - the degree of cooperation
  - the value of information

# FINE SETTING UNDER THE COMPETITION ACT:KENYA

MINISHI B.TERENCE

"A Kenyan economy with globally efficient markets and enhanced consumer welfare for shared Prosperity"

# Introduction

- ❖ Section 9 of the Act mandates the Authority to promote and enforce compliance with the Act as well as carry on investigations
- ❖ The primary provisions of the Act on restrictive trade practices are set out under Part III: prohibits agreements between undertakings, decisions by associations of undertakings and decisions which have by object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya.

## Criminal Sanctions

- ❖ Section 21(9) of the Act basically provides for the criminal sanctions for contravention of Part III of the Act.
- ❖ **Court** may impose a fine of Kshs 10 Million, imprisonment for a term not exceeding 5 years or both.
- ❖ criminal sanctions may be imposed on companies/individuals



## Administrative Sanctions

Section 36: Authority may

- ❑ (a) declare the conduct which is the subject matter of the Authority's investigation, to constitute an infringement of the prohibitions contained in Section A or B of this Part;
- ❑ (b) restrain the undertaking or undertakings from engaging in that conduct;
- ❑ (c) direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
- ❑ (d) impose a financial penalty; or
- ❑ (e) grant any other appropriate relief.

Section 38: provides for settlement agreements but do not give timelines

## Cont.

- ❖ The Authority is not limited by the section 36 of the Act on amount of financial penalty to be imposed.
- ❖ In determining the appropriate penalty the Authority considers mitigating and aggravating factors as well as international best practice thereby limiting penalty to 10% of annual preceding year gross turnover.
- ❖ The Authority has proposed amendments to the Act to include the provision of a penalty of 10% of preceding year turnover
- ❖ Key mitigating factors: admissions, cooperation, duration, effect on competition, non implementation.
- ❖ Administrative sanctions under the Act may be imposed on companies both companies/individuals

# FINING REGULATION IN TURKISH COMPETITION LAW

ICN Cartel Workshop  
Madrid  
5 October 2016

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# The Act on the Protection of Competition

## Article 16 of the Act

- ... an administrative fine shall be imposed up to ten percent of annual gross revenues of undertakings and associations of undertakings or members of such associations to be imposed a penalty, which generate by the end of the financial year preceding the decision ...
- ... an administrative fine up to five percent of the penalty imposed on the undertaking or association of undertakings shall be imposed on managers or employees of the undertaking or association of undertakings who are determined to have a decisive influence in the infringement.
- ... the repetition of infringement, its duration, market power, whether they comply with the commitments given, whether they assist with the examination, and the severity of damage that takes place or is likely to take place ...

# The Regulation on Fines

- It has been in force since 2009 (beginning of a new era).
- The goals to be accomplished by the Regulation on Fines:
  - Ensuring that fines are specifically and generally deterrent.
  - Creating transparency, objectivity and consistency in fining process.
  - Taking account of such points as assistance with examinations and active cooperation while determining the fines, and thus promoting them.

# The Regulation on Fines

## Base fine (Article 5)

- *2% - 4% for cartels*
- *0.5% - 3% for other violations*
- *increased by half: 1 – 5 years*
- *increased by one fold: > 5 years*

## Aggravating and mitigating factors (Article 6 & 7)

- *Repetition of the violation (aggravating)*
- *Forcing other companies (aggravating)*
- *Affected turnover represents small share in total turnover (mitigating)*
- ...

# The Regulation on Fines

## Fines to be applied to managers and employees (Article 8)

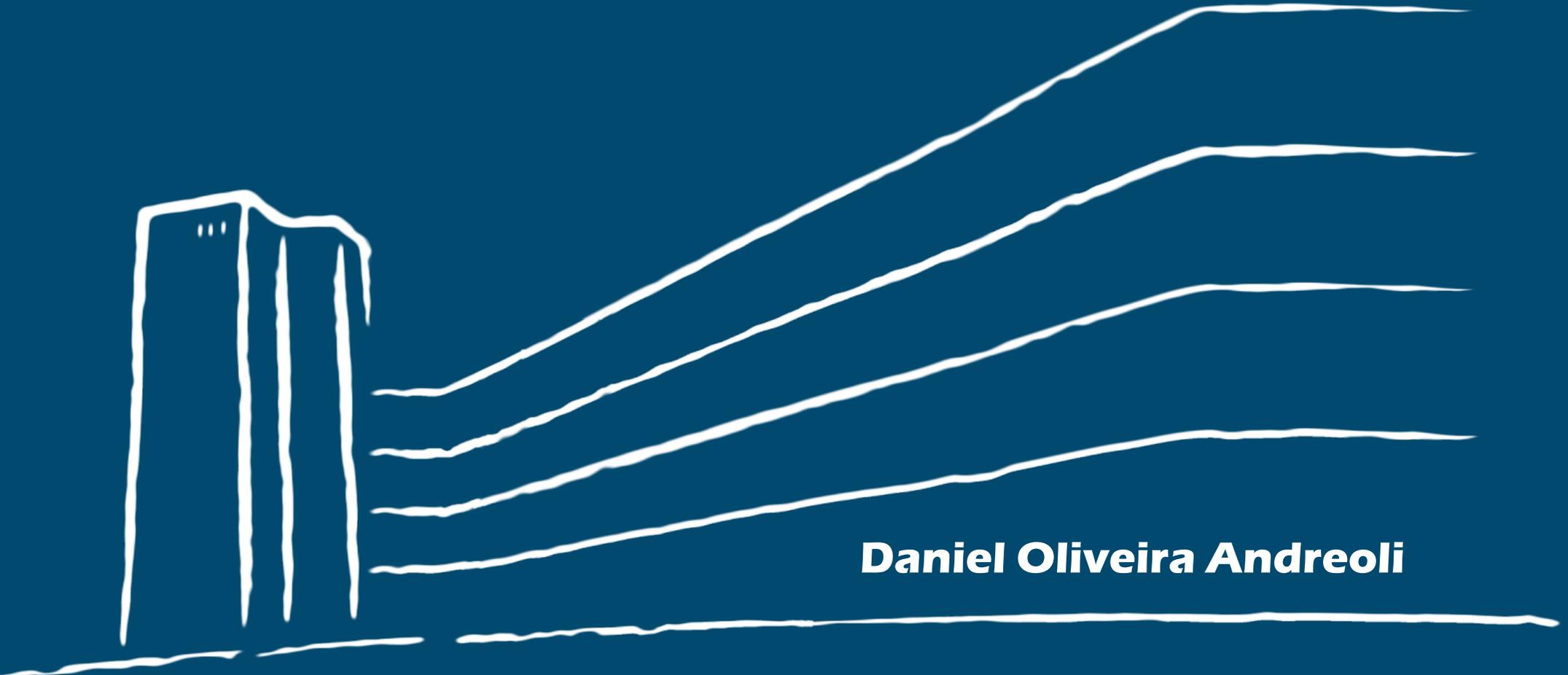
- *Decisive influence on the cartel: 3% - 5% of the fine*

## The Leniency Regulation

- *Non-imposition and reduction of fines with regard to undertakings and their managers and employees making an active cooperation with the Competition Authority for the purposes of detecting cartels.*
- *First undertaking to undercover a cartel gets immunity from fines.*
- *Other undertaking can also benefit up to %50 reduction.*

TOZZINIFREIRE  
ADVOCADOS

# Antitrust Fines in Brazil



**Daniel Oliveira Andreoli**



# Historical Evolution

- **Steel Cartel – first cartel case decided by CADE**  
**Fine of only 1% - CADE wanted to avoid eventual complications related to a high penalty**
- **Industrial Gases Cartel**  
**Biggest total fine in a case**  
**Biggest fine to a single Defendant**  
**Total fines to individuals**  
**Decided on Sept 1<sup>st</sup> 2010**  
**BRL 2.9 billion (Approx. EUR 800 million)**  
**BRL 2.2 billion (Approx. EUR 600 million)**  
**25% of gross turnover x2 (Recidivism)**  
**BRL 6.8 Million (Approx. EUR 2 million)**
- **Cement Cartel**  
**Biggest total fine in a case**  
**Fine to a single Defendant**  
**Total fines to individuals**  
**Alternative fines imposed**  
**Decided on May 28<sup>th</sup> 2014**  
**BRL 3.1 billion (Approx EUR 860 million)**  
**BRL 1.5 billion (Approx. EUR 400 million)**  
**BRL 24 Million (Approx. EUR 6.6 million)**  
**Main one: Prohibition to obtain financing and to participate in bids related to the Government for 5 years**
- **Current average for Cartel cases**  
**12 – 20% level of penalties**

# Alternative fines

CADE can also determine:

- The publication of an outline of the final decision in a newspaper chosen by the agency
- The Prohibition to (i) obtain financing from official institutions and (ii) participate in bids related to the Government (considering federal, state and municipal entities) for 5 years
- The enrollment of the Defendant in the National Consumer Protection Registry
- The company divestiture, transfer of corporate control, sale of assets or partial interruption of activity
- The prohibition of the Defendant to carry on commercial activities on its own behalf for a period for 5 years

# Leniency and Settlement Agreements

- **Leniency**
    - Full
    - Partial
    - Plus
  - **Settlement Agreement**
    - Discount\*:
      - 1<sup>st</sup> Settlement
      - 2<sup>nd</sup> Settlement
      - 3<sup>rd</sup> Settlement
- Applicable for companies and individuals  
Full immunity - Administrative and Criminal  
Immunity for criminal charges and discount up to 2/3 of the penalty  
Full immunity on the new investigation and discount of 1/3 in the existing investigation
- Applicable for companies and individual  
No Criminal immunity
- 30 to 50% on the estimated fine  
25 to 40% on the estimated fine  
25% max on the estimated fine

**\*Each settling party will be entitled to a discount lower than the one obtained by the previous settlement**

# Questions & Answers

# Aggravating factors

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In determining fines, what type of "aggravating" factors are most commonly taken into account?

## Mitigating factors

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In determining fines, what type of "mitigating" factors are most commonly taken into account?

# Transformation through the supply chain

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Where fines are calculated based on turnover and cartel members transform the cartelised product and then sell the transformed product:

- is the value of the cartelised product contained in the sales of transformed product taken into account?
- if a company sells the cartelised product to a related company, which transforms and in turn sells the transformed product, are the sales of the related company taken into account for the determination of fines imposed on the cartelist?

## Sales across national boundaries

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Where fines are calculated based on turnover and the cartel is formed by foreign companies, how is turnover calculated where:

- cartel participants sell the parts for which the cartel was formed, then the parts are assembled into end products in your jurisdiction, and all or most of the end products are exported and sold in other jurisdictions?
- cartel participants sell the parts in other jurisdictions, then the parts are assembled into end products in the other jurisdictions, and the end products are imported and sold in your jurisdiction?

# Co-operation and interaction with settlement

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In determining fines for participation in a cartel, how is effective co-operation and/or refusal to co-operate with an investigation taken into account?

- Can a cartelist agree to "settle" an investigation/prosecution with the competition authority?
- Does it matter whether the investigation/prosecution is civil or criminal?

# Separate fines for obstructing an investigation

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Are there any provisions to impose fines for refusing to co-operate and/or obstructing an investigation, separate to any fines for cartel conduct?

- Are such fines imposed by your competition authority or by other authorities?
- How are the amount of such fines determined?
- How do these provisions interact with any "aggravating" factor related to failure to co-operate?

## Trends in amount of fines

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Have there been any changes in the method of calculation of fines and any trends in the amount of fines actually imposed, over the last 10 years?

## Role of individuals in fine setting

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Can fines be imposed on individuals?

- How does the process for fine setting differ for individuals compared to fine setting for companies?
- Are fines imposed on individuals in other jurisdictions taken into account?