

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

SANCTIONS IN ANTITRUST CASES

- Summary of Discussion -

1-2 December 2016

The attached document is a summary of the discussion held during Session IV of the 15th meeting of the Global Forum on Competition on 1-2 December 2016.

More documents related to this discussion can be found at:
<http://www.oecd.org/competition/globalforum/competition-and-sanctions-in-antitrust-cases.htm>.

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Summary of Discussion

By the Secretariat

1. The Chair of this session at the Global Forum, Mr. Márcio de Oliveira Júnior, opened the discussion on “*Sanctions in Antitrust Cases*” and welcomed the participants. He noted that the session received 38 written contributions.
2. The Chair introduced the topic, by outlining the objective of the session which is to discuss antitrust fines and other sanctions imposed in different jurisdictions. The Chair noted that fines play an important role in deterrence. The amount of fines has dramatically increased in recent years. Still, cartel activity remains at high levels, judging by number of prosecutions. Much debate exists about the appropriate level of fines. Some commentators suggest that fines are insufficient to deter anticompetitive conduct while others maintain that fines and damages are not linked to incentives of managers, so that other forms of sanction should take higher priority. These other forms, include criminal sanctions, disqualification orders on directors of undertakings, publication of findings of infringements and bans on bidding for public contracts.
3. The Chair welcomed the four expert panellists: Professor Caron Beaton-Wells from University of Melbourne, Australia; Vani Chetty from Baker & McKenzie, South Africa; Professor John M. Connor from Purdue University in the US; and Professor Hwang Lee from Korea University in Korea.

1. Introduction

4. To set the scene, the Chair gave the floor to the Secretariat for a brief overview of the Background Paper.
5. The Secretariat outlined the objectives of antitrust fines, anticompetitive conduct and addressees. Many competition authorities adopt several steps in setting fines: first, determination of the basic fine; second, adjustments (including aggravating and mitigating circumstances); third, comparisons to limits; and fourth, considerations related to leniency programmes. Competition authorities often confront several challenges, including: (i) how to consider parental liabilities; (ii) how to calculate fines involving vertically-integrated undertakings and foreign sales; (iii) the suspensory effect of judicial scrutiny; (iv) the actual collection of fines; and (v) the imposition of fines on trade association. A number of competition authorities impose other forms of sanctions in addition to corporate fines: (i) criminal sanctions; (ii) director disqualification; (iii) publication of findings of infringements; and (iv) debarment against bid rigging.
6. The Chair then asked Professor Lee to analyse several important topics surrounding the antitrust fining methodologies.

2. Antitrust fining methodology in the era of globalization

7. **Professor Lee** started with the specificity of fining guidelines. More detailed fining guidelines are not always beneficial for achieving the deterrence goal of antitrust fines. Economic theories provide a sound framework for evaluating fining methodologies, but do not provide compelling sets of specific factors that should be followed by the competition authorities. Competition authorities must be provided with a necessary level of discretion. The global conversation to find consistent fining approaches should focus on the search for a balanced mix of discretion and specificity while also taking into consideration the diverse institutional settings faced by competition authorities.

8. The judicial review of the discretionary fines imposed by competition authorities plays an important role in establishing the legitimacy of antitrust fines by ensuring that the fines are imposed within the legal boundaries of the proportionality. Other possible antitrust sanctions, excluding fines, should be assessed as part of a comprehensive approach in order to guard against the potential for over deterrence. The various tools have different levels of effectiveness in each jurisdiction.

9. To maintain the integrity of antitrust fines, simply diverting antitrust fines to the government budget is not sufficient. The ex post distribution of the proceeds should be more proactively discussed. Furthermore, antitrust fines should not undermine the private actions

10. In designing effective antitrust fines, it is important to address the tax deductibility of antitrust sanctions and the deterrent effect of foreign competition authorities who were previously considered as exogenous factors in national competition law enforcement.

11. In the era of globalisation of antitrust, international co-operation among competition authorities is essential not only to close loopholes in addressing international cartels; but also, to prevent potential over deterrence concerns generated by overlapping enforcement. A more difficult question is co-ordination of antitrust fines.

12. The Chair thanked Professor Lee for his presentation and asked **the Peruvian delegation** to explain the unique formula for imposing a basic fine in Peru. The methodology for calculating a fine is defined by the Peruvian competition act taking into account the illicit benefit that the economic agent expected or actually did obtain as a result of the anticompetitive conduct. The benefit of this methodology is the establishment of clear rules that generate transparency and the severity of the fines imposed for infringements of the law.

13. The Chair turned to **Turkey** to specify how the TCA imposes fines on companies and why the TCA uses the concept of total turnover as a basis for calculating the base fines. In Turkey, the fines are based on total turnover of the undertakings, because total turnover is very clearly specified in official accounting documents bringing certainty to the fining. Turkey calculates the base fine depending on the type of violation. For cartels, between 2% and 4% of the turnover is determined as the basis and for other violations, Turkey uses between 0.5% and 3% to calculate the base fine. After the base fine, Turkey takes into consideration aggravating factors such as repetition, continuing violation after notification of investigation. Mitigating factors are then applied to the fine. Turkey does have a leniency process. The first applicant can be granted full immunity, and ensuing applicants can be granted a reduction of the fines. An amendment to the competition law is currently with Parliament and includes a settlement process.

14. The Chair thanked Turkey and asked Bulgaria to clarify the positive and negative effects the methodology it uses to calculate fines.

15. **Bulgaria** explained that the first step in the process is to estimate the net value of sales generated by the undertaking from selling the relevant products to which the infringement directly or indirectly relates. The next step is the calculation of the basic amount. It is a percentage of the value of sales that were estimated under step 1. The next step in the calculation is to multiply the basic amount by a factor for duration. The last step is the adjustment of the basic amount, so the basic amount may be increased or reduced by 10% for each of the established aggravating or mitigating circumstances.

16. The Chair thanked Bulgaria and asked Czech Republic to give a brief overview of the new fining guidelines including the rationale for the adoption of new guidelines.

17. **Czech Republic** explained that concerning the changes, the methodology for setting fines remains the same. The Czech procedure is very similar to the Bulgarian methodology. The changes are related to the factors and parameters used to calculate the precise amount of the fine in order to increase fines. The new guidelines will increase the level of fines by at least 100%.

18. The Chair thanked Czech Republic and invited Costa Rica to elaborate on the case described in its contribution in terms of how to determine the fine.

19. **Costa Rica** explained that the law states that a violation of the antitrust law in the telecoms sector would be fined between 0.5% and 1% of the undertaking's gross income obtained during the previous fiscal year. In a case that is deemed to be particularly severe, the undertaking can be fined up to 10% of its annual sales, value of its assets or presumed revenue for the period in question. Taking into consideration those circumstances and under the principle of proportionality, it was determined, that the sanction should be USD 4 million that represents around 0.5% of the gross income. Parental liability was considered but, in the end, only the company was taken into consideration and not the whole economic group resulting in the fine of USD 4 million. The Chair thanked Costa Rica and invited the United States to clarify its position on a compliance programme as a mitigating circumstance.

20. **The US** explained that it believes that an effective compliance programme provides very significant benefits to corporations, in particular if they deter cartel activity from taking place in the first place. The second benefit is that with good compliance programme should cartel activity be detected, the company will be the first one to approach the DOJ and take advantage of the leniency programme. If the company has failed to either deter the conduct or be the first one in, under US sentencing guidelines, the general rule is that an effective compliance programme will allow for a benefit in the calculation of the fine. This benefit very rarely applies in antitrust cases particularly if the company unreasonably delays coming in and approaching the DOJ. Furthermore, there is a presumption that a programme is not effective if anyone with a high level or substantial authority within the corporation has participated in, condoned or wilfully ignored the effects. Because of the nature of cartel activity, it's almost always the case that high-level personnel with price fixing authority in the corporation will be involved. For these reasons, it doesn't absolve a corporation from or give a corporation credit for what happened before, but a corporation will get credit for any subsequent changes in the corporation.

21. The Chair thanked the US and invite Georgia to elaborate on the antitrust case in terms of setting fines.

22. **Georgia** explained that according to the Georgian competition legislation, in cases of abuse of dominance or cartels, economic agents shall be subjective to the fine – no more than 5% of annual turnover for the previous financial year. As a result of investigations, anticompetitive agreements were proved to involve eight economic agents. The agency imposed fines totalling USD 23 million. Georgia has guidelines on fine calculation, which provides criteria for determining fines, but allows the agency to exercise discretion. The agency took into consideration, for example, the duration of violation; the roles of the economic agents; the benefits gained from agreement; and, total turnover of the companies.

23. The Chair thanked Georgia and directed several questions to Argentina related to efforts to develop a mechanism for setting fines included in the draft bill?

24. **Argentina** explained that the reason for the inclusion of a fine setting mechanism in the new law was to integrate an element of deterrence. The current law is actually an invitation to collude, under the draft bill, the basis of the fine is to get mainly related with the relevant market where the illicit things took place to increase deterrence. The proposed fining mechanism is based on a calculation of double the illicit gains from the anticompetitive act, added to which is a percentage of up to 30% of the relevant market in which the conduct took place, or 30% of the consolidated turnover in Argentina only. If none of these elements can be calculated the Argentina will impose a maximum fine of up to 200 million units, each unit being approximately 1 dollar.

25. The Chair thanked Argentina and closed the first part of the discussion.

3. Global antitrust enforcement

26. The Chair moved to the second part of the discussion on global antitrust enforcement. Professor Connor took the floor first to elaborate on the recent global enforcement directed at international cartels.

27. **Professor Connor** started his presentation by asking: To what extent have penalties increased in the last 26 years? How severe are they? What is the evidence that they may be discouraging the formation or effectiveness of private cartels?

28. The replies to these questions are drawn from a database of more than 1300 international cartels discovered worldwide during 1990-2015. Total corporate cartel fines imposed averaged less than USD 100 million annually in the early 1990s. In the past five years, these fines have reached 12 billion USD per year. Should current trends continue, annual fines will be USD 40 to 50 billion per year by 2020. The geographic location of cartel fining is changing dramatically. In the 1990s, the United States and the EU accounted for 98% of the world's cartel penalties. However, during 2010-2015 the EU accounted for 44% of all penalties (half from the NCAs), the US 35%, and the rest of the world (ROW) 21%. Fines imposed by the EC and the US government are slow growing, whereas those imposed by the EU's NCAs are fast growing. Fines by ROW authorities are the fastest growing. Corporate cartels from Western Europe have paid almost half of all penalties in 1990-2015, and US companies one-third.

29. The major factor explaining the rapid increase in cartels discovered as well as cartel penalties is the growth in the number of mature antitrust authorities. Using the first year an authority successfully prosecuted an international cartel as an indicator, the number of mature authorities rose from 3 in 1990 to 75 in 2016. As of mid-2016, more

than 1200 individuals have been suspects (targeted, indicted, etc.) in international price fixing by 38 criminal-law jurisdictions. Of these suspects, 44% have been punished (18% were fined only and 26% imprisoned). This data represents a 2016 snapshot of cartel penalties. Almost half of all indicted cartel suspects are “waiting”. They are waiting to be found guilty, to be sentenced, or are fugitives evading sentencing by staying outside the prosecuting jurisdiction.

30. Cumulative private recoveries are large (USD 59 billion), almost all generated by US courts. They are a significant source of deterrence in North America representing two-thirds of all monetary penalties. Private recoveries combined with fines make North American Severity Ratios the highest in the world (about 33% of affected sales). The EU’s NCAs are the next highest (30%), while all other jurisdictions average in the 12% to 16% range. While interesting, severity is not as relevant as the Recovery Ratio. The degree of severity is only loosely correlated with the Recovery Ratio. Under the most optimistic assumptions, deterrence cannot be attained if recovery is not above 100% of damages. The most precise empirical study of optimal deterrence, using conservative assumptions, examined 75 US-convicted international cartels. It concluded that penalties were on average one-fifth the size required to achieve optimal deterrence.

31. The Chair thanked Professor Connor and turned to Austria to invite an overview of recent antitrust enforcement in Austria.

32. The **Austrian** competition authority has been quite active in enforcing antitrust cases, especially in the field of the food retail sector and regarding the resale price mechanism. The amount of fines has been increasing over the last 10 years, and is now up to almost EUR 190 million. Fines are imposed by the cartel court upon application of the Austrian competition authority. In a recent case of resale price maintenance, in the food retail market, the court of first instance fined an Austrian company EUR 3 million. The Austrian competition authority believed the fine was not sufficient, appealed the case to the supreme cartel court. The court multiplied the fine to almost EUR 30 million. In addition, the agency convinced the Austrian government to increase its budget by 50% for 2017 in order to hire 10 more case handlers.

33. The Chair thanked Austria and asked Brazil to specify how CADE imposes fines on companies based on the Competition Law Amendment in 2011.

34. **Brazil** explained that Article 33 of the Brazilian Competition Act states that companies may be held liable for the actions of their “sister companies”. It is interesting to highlight two specific consequences of this joint liability. On the one hand, if there is a foreign company that is sanctioned within the Brazilian system, its Brazilian branch may be held accountable as it has joint liability. A second practical consequence is related to procedural matters. CADE does not need to include all of the concerned companies in the proceeding for purposes of notification and serving of process, so that also adds to the effectiveness of the investigation and also a speed judgment that enables within the system.

35. The Chair thanked Brazil and invited the European Commission to explain the justification as well as the strengths and weaknesses of parental liability.

36. **According to the delegate from the European Commission (EC)**, this approach has several advantages. First, it simply reflects economic reality. Second, even in the case of restructuring, it allows the EC to impose effectively a fine and also to enforce it. Finally, the EC holds the entity which benefits from cartel profits liable. The main challenge regarding parental liability is to prove that there is decisive influence if there is not 100% presumption which can be very burdensome. The legal maximum of a fine is

calculated based on the turnover of the whole undertaking, this includes the parent company. In cases of recidivism, the EC can increase the fine if any legal entity which is part of the undertaking was previously involved in cartel conduct.

37. The Chair thanked the EU and invited Chinese Taipei to take the floor.

38. In **Chinese Taipei**, administrative fine ranges from TWD 100 000 to TWD 50 million. Chinese Taipei has a regulation which is included in 2011 amendment regarding abuse of dominant position or concerted actions. The authority can impose fines of up to 10% of the total sales income of the previous fiscal year of the enterprise. Factors to be considered in cases of a serious violation, include consideration of the scope of the market affected and the duration of anticompetitive conduct. The authority will also take into consideration mitigating factors such as if the enterprise has established compensation agreements with the victims.

39. The delegate described a case involving the concerted action of nine independent power plants or producers (IPPS). The Ministry of Economic Affairs permits 9 IPPS to generate electricity and to sell it to the only power suppliers which is TPC (Power Company). The rate of power sold to TPC was set by negotiation based on the low price of coal. When TPC asked the IPPS to adjust the rates to reflect a low coal price, the IPPS refused. During four years, over 20 meetings were held to ensure a mutual agreement on prices. As a result the IPPS were fined a total of TWD 6.32 billion. This amount was considered as optimal based on the following reasons: the fine reflects the damage of the illegal actions and incorporates the deterrence effect. The firm also received a reduction in fine due to mitigating factors. The ruling decision received a lot of public support from the society.

40. The Chair thanked Chinese Taipei and Russian Federation asking several questions: Could you elaborate on the abuse of dominance case? How do you calculate the fine in the case? Do you think calculating fines in abuse of market dominance is more difficult than cartel cases? If so, what are the reasons?

41. **The delegation of the Russian Federation** reported that abuse of dominant position as well as anticompetitive agreements is prohibited in accordance with the federal law on the protection of competition. This law applies to all companies, including state owned ones, in all sectors. To calculate fines, Russia calculates 1%-15% of a company's turnover on the relevant market. The FAS indeed conducted three so-called waves of antitrust cases against the largest vertically integrated oil companies in the Russian market. The code of administrative offences contains a precise calculation method. Certain minimum, medium and maximum fines are set, and in cases where companies have some mitigating or aggravating circumstances, the amount of fines should be changed. For antitrust cases, FAS calculates the fines, although the court may review it. Regarding oil companies cases, all of the decisions FAS were supported by the Russian Supreme court after passing all the three courts. Aggressive enforcement of abuse of dominance by the public and private oil companies demonstrates a feature of Russian competition law enforcement: equal treatment. The oil cases involved both Russian public and private undertakings. The biggest fine was imposed on state owned company. For cases of abuse of dominance, the main difficulties in calculating fines are related to geographical and product market definition. Cartel cases are complex because of the necessity to understand the collusion scheme itself and determine the correct distribution of blame amongst the cartel participants. Consideration of aggravating or mitigating circumstances will depend up on identifying the role of each of the cartel participants. When FAS imposes fines in cartel cases, the provisions of the leniency programme are considered. Russia's system of fine calculation is open, clear and

transparent. Any potential violator of competition law, calculate the risks and costs associated with competition law infringement of infringement.

42. The Chair thanked the Russian Federation and asked Mexico to provide a short overview of the legislative changes regarding antitrust sanctions.

43. **Mexico** explained that in 2014 a new federal competition law entered into force introducing major changes to the competition law system and amendments to the Mexican federal criminal code. Additional changes were introduced to the sanctioning scheme raising the costs associated with anticompetitive conducts. The new law empowered COFECE to apply administrative sanctions and fines. Criminal cases of competition law infringements are referred to the general prosecutor's office. New sanctions include disqualification of directors and executives for participating in absolute monopolistic practices; divestiture of assets in case of recidivism; measures to prevent access to essential facilities; more severe criminal sanctions for absolute monopolistic practises; and the criminalisation for the destruction or alteration of documents during on-site inspections. While Mexico has had the power to impose criminal sanctions since 2011, no cases have yet been brought forward although COFECE is working actively to rectify this situation. In 2014, before the enactment of the new federal competition law, only four domestic companies applied to the leniency programme. However, during 2015 the COFECE received 20 applications from domestic companies being investigated and in the first semester of 2016, the agency received 21 applicants so far. The rise in leniency applications is a good indication that the deterrence effect is working with the new sanctions.

44. The Chair thanked Mexico and asked Indonesia to specify the difficulties of collecting fines and the measures to deal with them and to describe some improvements in Competition Law.

45. **Indonesia** reported that the agency does not have executorial power. To deal with the difficulties of collecting fines, the agency sues the concerned enterprise on a criminal basis in order that the courts will take charge of the issues as a criminal matter. The courts will impose additional fine. The amendment to the competition law is still ongoing. Regarding the issue of the size of fines, Indonesia changed the basis for fine determination from an absolute number, maximum IDR 25 billion, into a relative number, maximum 30% of sale. When the law was established, a maximum fine of IDR 25 billion seemed to be sufficiently large, however, experience has shown otherwise. The KPPU has tried to create a deterrent effect using the case of a garlic cartel. Total sanctions for the cartel amounted to IDR 6.4 trillion despite the maximum stipulated by law as only IDR 25 billion.

46. The Chair thanked Indonesia and asked Ukraine to elaborate on the proposed draft changes to its law on fines collection.

47. **The Antimonopoly Committee of Ukraine (AMCU)** takes decisions in competition cases and the defendants have two months to challenge, or implement the decision. In cases where a party does not pay voluntarily the amount of the penalty, the AMCU can only collect the penalty via judicial procedure. Therefore this procedure, the legal mechanisms for judicial review of the cases and respectively for judicial collection of their penalties are often abused by defendants who use them to extend the penalty collection period for collection of penalties, from six months to over a year. The amendments proposed by the AMCU state that if decisions of the AMCU are not appealed to the court on merits, the decision will be used as basis for the initiation of

collection proceedings. The amendments will improve the collection of penalties and ensures that undertakings do not avoid legal liability.

48. The Chair thanked Ukraine and turned to Pakistan.

49. **The delegation of Pakistan** explained that the competition commission has taken whatever measures it could under the law. In higher courts, companies can file against the actions of the competition commission. The legal system provides for this injunctions process and that is the basic issue here because whoever goes to the court and tries to find some reasons to call issue the injunctive orders by invoking the jurisdiction. In a case of the Pakistan Poultry association, the commission has fined them PKR 100 million. The tribunal, after hearing the parties, has decided in favour of the competition commission and now they have filed the appeal before the discipline court. As soon as the case is disposed of, the commission would initiate the recovery of fines process.

50. The Chair thanked Pakistan and invited India to highlight the challenges faced by the Competition Commission of India when imposing monetary penalties.

51. **The delegation of India** explained that out of a total of 519 final orders passed by the CCI, penalties have been imposed in 57 anticompetitive agreements cases and in 12 cases of abuse of dominance cases. There are two main issues that the agency is grappling with two main issues as indicated in the CCI's written contribution. The first issue is regarding definition of turnover and the second issue is that of individual liability. The competition act includes a provision that sets the maximum limit as up to 10% of the turnover of the total enterprise which actually violates the act. However, the appeal tribunal in the case of Excelcorp held that in case of multiproduct companies, the turnover should be turnover in the relevant market only. The CCI appealed this decision. The case then went to the apex court. The court has held the hearings and the decision in this case are expected. The CCI believes that a penalty on the turnover of the enterprise as a whole should be levied.

52. Regarding individual liability, currently determination of the liability of individuals and the imposition of fines takes place only after the enterprise is found guilty. The CCI considers that there can be composite proceedings, for the enterprise and for the individuals. This view is in line with Supreme Court decisions on similar cases under other acts. However, the Competition Appellate Tribunal disagrees and holds that the enterprise must first be found guilty before the CCI can proceed against individuals. The CCI has appealed and the matter is now before the Supreme Court.

53. The CCI has found that there is a growing demand from different quarters for penalty guidelines, but since these two issues are pending before the Supreme Court, the agency will wait for this jurisprudence to settle, before developing guidelines on regulations and sanctions.

54. The Chair thanked India and turn to Romania to comment on court review in the context of suspensory effect.

55. **The delegation of Romania** explained that a challenge to an RCC decision to impose a fine leads to automatic suspensory effect on that fine. According to the competition law, the undertaking can obtain the suspension of an RCC decision providing that they pay a bail, and the suspension of this bail is established by the general fiscal law. In order to obtain suspension in the court, the companies have to prove that two cumulative conditions are met. The first one is to prove that prima facie the RCC decision is illegal. The second condition is the occurrence of imminent damage in case this fine is

paid. Those two conditions have to be met at the same time as they are cumulative. In practice, this is very difficult to prove. During the last four years, the courts have changed their practices and have not suspended RCC fine decisions.

56. The Chair thanked Romania and invited BIAC to share its concerns on the deterrent power of antitrust fines and extraterritoriality.

57. **BIAC** pointed out several concerns that stem from extraterritorial effects. BIAC agrees that fines and penalties should be set at an optimal level to deter illegal conduct. However, BIAC notes that some of the methodologies that have been raised even at the Global Forum are subject to some controversy. If we assume fines are being set at an optimal level, in imposing fines each jurisdiction should base its fines on the sales made in the domestic country and the harm caused to domestic consumers. This principle also applies in cases involving other forms of relief, injunctive relief and other remedial measures.

58. BIAC believes that the remedial relief should be targeted to stop the harm occurring in the domestic market to domestic consumers because if it is broader than necessary to stop the domestic harm then it is necessarily imposing on foreign interests, on conduct that is not relevant to domestic interests. There are circumstances where that kind of relief may need to be imposed in a way that has an effect in a foreign jurisdiction, for example, in order to stop price fixing in another jurisdiction that has a direct substantial and reasonably foreseeable effect on the domestic economy. But where the domestic authority acts more broadly and imposes remedial relief relating to foreign effects rather than domestic effects there is a very significant danger, especially in cases of abuse of dominance.

59. There is a serious issue with respect to conflict. Unlike cartel cases where we have general consensus of what the standards should be, jurisdictions have very different views of what standards should be for abuse of dominance. For example, a market share that is presumptively unlawful in one country maybe presumptively lawful in other countries; differences on standards of exclusionary conduct and what constitutes exclusionary conduct.

60. When multiple authorities act, the most restrictive approach could end up being applied in foreign countries and could actually retard competition in those foreign countries where they have a different approach. There is certainly a lack of consensus on the standards to be applied. There are very serious comity issues that BIAC would like to point out. More importantly, if you have antitrust authorities imposing remedies that go beyond their own domestic concerns and domestic interests, remedies transform from a tool of competition policy to a tool of trade policy. In summary, BIAC thinks that sanctions should be aimed at the effect on the domestic market; those sanctions should be no broader than necessary to address the domestic harm; the principles of comity should be very carefully regarded and respected in this instance; and that the tools of competition should avoid affecting trade policy. All of these things if done will enhance the enforcement credibility of antitrust authorities, will maximise their effectiveness and therefore will lead to a maximum deterrence of anticompetitive conduct.

61. The Chair thanked BIAC and closed this part of the discussion.

4. Alternatives to fines: Criminal sanctions, disqualification, debarment and so on

62. The Chair then moved the discussion on to alternatives to fines like criminal sanctions, disqualification and debarment. The Chair asked Professor Beaton-Wells to kick off this part of the session with a presentation on the relationship between criminal sanctions and leniency programmes.

63. Professor Beaton-Wells started her presentation by highlighting the international proliferation of criminal regimes. Criminal sanctions raise the stakes for any legal system, as they send ripples through each element of the legal process. One such element is the leniency policy. The relationship between these two important and, in many respects, controversial phenomena is still to be fully understood. Cartel criminalisation and cartel leniency may be seen as mutually reinforcing. Cartel criminalisation and cartel leniency can also be seen as in tension with and even potentially undermining of each other. One approach to navigating this complex set of issues involves examining the relationship from both instrumental and normative perspectives.

64. From an instrumental perspective, a key question is whether criminal sanctions enhance or impair the effectiveness of a leniency policy. From a normative perspective, a key question is whether a leniency policy enhances or impairs the effectiveness of a criminal regime that is whether a leniency policy weakens the capacity of the criminal law to appropriately and legitimately label and punish conduct that warrants criminal treatment. In general terms, this analysis suggests that the instrumental benefits of a cartel leniency-cartel criminalisation combination are questionable and that the combination may come at a normative cost. This leaves open the conclusion that criminal sanctions and leniency policies are uncomfortable if not unnatural allies in the war against cartels.

65. The Chair thanked Professor Beaton-Wells and turned to Vani Chetty to share her experience in antitrust cases.

66. Vani Chetty presented some examples of the increasing quantum of administrative penalties as well as examples of the behavioural remedies that have been imposed in the recent past. It is clear that, not only is the quantum of the penalties becoming significantly higher, but the extent of the behavioural remedies that are being imposed are also increasingly more burdensome. Ms Chetty provided examples of compensatory damages cases that have followed from findings of a prohibited practice by the competition authorities. While civil damages cases arising out of findings of antitrust infringements have been slow to start, the institution of these cases has gathered momentum recently. She described other government interventions that have been instituted to supplement the private damages movement in South Africa. In this regard, the construction industry settlement will be used as a case study for the points being raised. Ms Chetty elaborated on the recently enacted criminal liability provisions of the Competition Amendment Act and the potential tension between the criminalisation of cartel conduct on the one hand and the success of the South African corporate leniency policy as an integral component of cartel enforcement, on the other.

67. The Chair thanked Vani Chetty and turned to the delegation of Chile to launch the discussion surrounding criminalising cartels.

68. **The delegation of Chile** discussed the different reasons why Chile adopted a new provision criminalising hard core cartels, which allows Chile to impose jail sentences up to 10 years. Administrative regulation is supposed to be morally neutral, whereas cartels need to be punished, and morally condemned. The other rationale for the reform was to

increase deterrence. There was a general sentiment that the current level of fines was insufficient. When Chile reformed the system of fines, it also introduced criminal sanctions. In practice, Chile considered that the criminalisation of cartels would not undermine the leniency regime, but improve the quality of the leniency applications. This same perspective can be said about the compliance regime generally.

69. The other explication for the reform is institutional: to resolve a debate about who can trigger criminal action. In the end, Chile decided on a competition law procedure. Fines on corporations or individuals can only be imposed after the economic prosecutor decides whether to hand the case to a criminal prosecutor and start a criminal prosecution. Another part of the discussion has been about the standard of proof, whether you're going to affect the investigation of competition law or not. The extension of the protection to information can be different in both administrative procedure and criminal procedure. Also there has been discussion of application of some criminal rights: the right to remain silent and other ones.

70. The Chair thanked the Chilean delegation and gave the floor to Australia to provide a brief overview of the first criminal charge laid in July 2016 against a cartel under the criminal cartel provision of the CCA.

71. The **Australian delegate** explained that he cannot describe the case in detail because it is currently before the court and the sub-judiciary rules prevent discussion about it. The case relates to a Japanese multinational shipping company who is being charged with cartel provisions which include price-fixing, market allocation and bid-rigging. The delegate stressed that, at this stage, these are allegations. On 18 July, the company entered a guilty plea which was just short of seven years after the cartel provisions were criminalised on 24 July 2009. The process to get to this point has been very challenging. First, the agency had to build the capacity to investigate cases criminally. The agency then had to build strong relations with the Australian independent prosecutor, also our federal police service who helped us with the use of covert powers to investigate. The agency also reviewed its leniency programme. The agency believes that the leniency programme is a crucial tool to enable the agency to detect cartels. A very substantial proportion of the cases the agency investigates come from the leniency programme.

72. The Chair thanked the Australian delegation and turned to Japan to comment and explain the relationship between leniency programmes and criminal sanctions in Japan.

73. **Japan** explained how the leniency programme interacts with criminal sanctions. In Japan, surcharge payment orders, based on the antimonopoly act is an administrative measure. The leniency programme is a system whereby administrative surcharges are immunised or reduced under certain conditions. Therefore, the leniency programme does not have a direct connection with criminal sanctions, but there is interaction between them. The JFTC will not file the accusation against the first applicant which is the leniency applicant, before initiation of an investigation procedure. This will be applied to the enterprises that belong to the same corporate group as the first applicant for leniency, and make a joint application. Executives and employees of the first applicant also will not be accused. This is because if the leniency applicant could be accused to the public prosecutor and could receive criminal sanction, the incentive to apply the leniency programme would be smaller or diminished.

74. The Chair thanked the Japanese delegation and asked Serbia to specify enforcement actions targeting bid rigging.

75. **The delegation of Serbia** explained that regarding criminal proceedings, there has been not been any convictions nor are there any pending criminal cases under either the cartel offence or the bid-rigging offence, which are two separate offences. In terms of cases, since 2012, the law on public procurement created the obligation to report suspicions of bid-rigging. This obligation is imposed on primarily on purchasers. With regard to black-listing, it is not the government that black-lists, but the Commission that may impose prohibition on participation in all public procurement for up to two years if a company is found guilty of bid-rigging. The Commission is very cautious in applying this sanction and will only do so when fines would not be sufficiently deterrent. Black-listing has been applied only once in an extreme case. The public procurement law includes a three year automatic reference on any company found guilty of bid-rigging. While these companies are not prohibited from competing for contracts, purchasers take it into account as a minus in their bid.

76. There is a problem of overlap between the competition and public procurement laws. The law on public procurement refers to submitting a false claim of independent offers and the competition law addresses cartels. It has been difficult to explain to the relevant authorities, that the two are not necessarily contradictory. To date, we have achieved some success.

77. The Chair thanked the delegation of Serbia and invited Lithuania to elaborate on its system for disqualification order.

78. **Lithuania** explained that disqualification orders apply to the company's CEO only. The system is roughly a copy of the UK's disqualification system. It applies under the following conditions: it must be the CEO of a company that has infringed the competition law; the infringement decision must be effective; and the company CEO has contributed to the infringement. The authority has to apply to a court for a disqualification order within 3 months after the infringement decision becomes effective. The sanction is from three to five years which the court determines. The most important question would be of course what does it mean, "contribution" to an infringement by company? In the first case, there must be direct involvement. In the second case, the CEO did not contribute directly but had reasonable grounds to suspect that the conduct of the company was anticompetitive and did not take any steps to prevent the conduct; and the last and probably most debateable condition is that the CEO did not know, but ought to have known. To date the agency has never applied to the court for this sanction.

79. The Chair thanked all participants and closed the morning session.

5. Report by the moderators of the break-out sessions

80. The Chair welcomed the participants to the afternoon session and invited the moderators of the break-out sessions to report back to the plenary. The Chair gave the floor to **Ms. Maria João Melícias, Portugal**, moderator of the break-out session on the steps of the fines setting process across jurisdictions.

81. Ms. Melícias explained that they looked at examples from three continents, provided by the delegations of Chinese Taipei, Argentina and Bulgaria. Because this is a very overarching topic covering many possible subjects, the delegates decided to focus their attention on two main related lines of discussion. Ms. Melícias stated that they explored whose turnover jurisdictions usually take into account when setting fines based on turnover which is actually the very first step of that process. On parental liability,

delegates heard case studies from South Africa and Brazil which explained the policy reasons underlying parental liability inter alia, the need to ensure appropriate levels of deterrence. Also agencies can avoid difficulties in collecting fines and limit the risks of insolvency. Other reasons include limiting the risk that companies circumvent fines by internal restructuring and internal shifts of turnover in profits, facilitating damages actions and of course encouraging effective compliance programmes across an entire organisation because when parents can be held liable and for higher fines, they are more willing to effectively supervise their subsidiaries' activities. Despite these very sound policy reasons, some jurisdictions may still face legal obstacles when it comes to parental liability related to the idea of corporate separateness or the principle of personal responsibility.

82. Ms. Melícias explained that delegates explored which turnover jurisdictions usually consider as a basis for calculation, total or relevant turnover, and the related role of statutory limits. Delegates found that despite the fact that economic theory indicates that a percentage of effective sales is a sound and proportionate proxy for the harm caused by each infringement to the competitive process in the relevant market, certain national courts have recently, at least in Europe, shown a preference for a greater weight being given to total turnover of undertakings as a basis for calculating fines. These courts see a percentage of total turnover, not as a cap, but as an upper end of a fine range. Delegates examined the consequences of these fining approaches with the contributions of the Spanish and German delegations. The consequences of each policy choice when it comes to the overall level of fines are as yet unclear. It seems that when a percentage as total turnover is taken as benchmark or basis of the calculation and as a maximum fine, SMEs that are usually mono-product companies will be advantaged. SMEs might in general face slightly lower fines. In contrast, this method might lead to an increase in fines for large multi-product undertakings. From a global perspective, arguments on the breach of the principle of *ne bis in idem* or double jeopardy may arise more frequently. However, since available studies show that the current level of fines is by no means excessive, or may even be sub-optimal, those potential risks should not raise too many red flags.

83. Finally, Ms. Melícias made a few remarks on the importance of having sanctioning guidelines. Guidelines provide transparency and legal certainty. They serve to complete the abstract criteria and very general legal limits often laid down in the law, and pursuant to the principle of legality applicable in many jurisdictions, companies should be given some degree of orientation as to the possible level of fines. This actually may reinforce incentives for leniency because in order to be encouraged to apply for leniency, companies should have a rough idea of what they are up against. Erratic or arbitrary fining decisions may undermine an agency's reputation. A consistent fining policy is crucial to gain credibility. Guidelines make it easier for the adversaries of fines to understand the level of fines imposed. They also reduce the perception of unfair special treatment. That being said, it's important that they still allow agencies with a sufficient margin for discretion and enough flexibility to differentiate between the particulars of individual cases in light of the principle of proportionality as observed by the Spanish delegation. Guidelines should not be too sophisticated and detailed to the point of being able to accurately predict the amount of the fine to be applied, for obvious reasons. It is also important to bear in mind the fact that judicial review of fining guidelines is key. Judges may look with suspicion at guidelines that curtail excessively their margin of discretion. It is necessary that when a fining decision is subject to judicial scrutiny, judges should be persuaded about why the calculation method is sound and provide sufficient grounds as to its underlying economic rationale.

84. The Chair thanked Ms. Melícias and gave the floor to **Mr. Ivo Gagliuffi, Peru**, moderator of the break-out session on practical issues in imposing fines, to report what was discussed in this group.

85. Mr. Gagliuffi presented several points based on the discussions. Regarding the suspensory effect of judicial review in imposing fines: in some jurisdictions during the judicial review, the application of the decision under appeal is suspended until the review of the appeal is complete. In this case, the deterrent effect of fines could be weakened, especially where appeal courts are slow to act. However, some jurisdictions take a measure to maintain deterrence effect of fines when a competition authority's decision is suspended pending an appeal. On the collection of fines: first of all, imposition of fines will not deter anticompetitive activities unless the fines are actually collected. However, some competition authorities are having difficulty collecting the fines that they have imposed, a situation, which may be common in young competition authorities. Difficulties in collecting fines may arise because 1) court proceedings, non-payment or overdue payment seems to be usual in some jurisdictions where appeals to the decisions of fines have become an easy and routine tool to prevent or delay enforcement; 2) companies may avoid payment of fines through liquidation with subsequent formation of different economic entities; and 3) competition authorities do not collect antitrust fines. Finally, regarding the relationship of leniency programmes and fines: After the fine has been determined, reductions on fines for leniency programme may be considered in cartel cases. Well-designed and administered leniency programmes increase the probability of detection and undermine trust among cartel participants. However, poorly-designed leniency programmes that provide too-generous reductions in fines will be exploited, thereby reducing deterrence. Some scholars claim that cartels may exploit leniency programmes by considering leniency applications in their strategy in order to maximise the benefits of fine reductions.

86. The Chair thanked Mr. Gagliuffi and turned to **Mr. Syarkawi Rauf, Indonesia**, moderator of the break-out session on alternatives to fines to summarise the discussion in the group.

87. Mr. Rauf noted several areas of agreement amongst delegates in the break-out session. Delegates confirmed that individual accountability is important besides company fines. This has been applied by United States where several prosecutions have taken place. According to Australia, in 2000, the number of personal imprisonments doubled as compared to the 1990s. The delegates noted even more severe individual sanctions are also applied, for example, personal disqualification meaning more ex ante efforts to prevent violations, for example, in Russia.

6. General discussion

88. The Chair opened the floor for general discussion.

89. **Argentina** asked Professor Beaton-Wells about the amount of detail about how to calculate fines should be in the law or in the competition act, and how much in guidelines issued by the agency. **Australia** commented that it's been a very helpful session in understanding the difference between Australian and other systems. Australia does not have this concept of a base, and that it seems that most other jurisdictions do have base fines.

90. **Germany** observed that an EU fine was the highest ever: EUR 2.93 billion to the manufacturers of trucks in the EU of which EUR 1.1 billion was imposed on Daimler alone. Germany asked the EC and the US if they calculate and take into consideration the potential of private damages in the amount of fines levied and consider the potential private damages act as a kind of mitigating factor on the fines.

91. **Professor Beaton-Wells** opined that in her view, there is a compelling case for having both corporate and individual liability and associated sanctioning. The next question is what form of sanctioning and how sanctions should be calculated and so on. Looking at the question of why one should have both corporate and individual liability, there are two reasons for that conclusion. If the overriding goal is deterrence, then we have to accept that neither corporate fines on their own nor criminal sanctions on their own are sufficient for deterrence. Both companies and individuals are implicated, culpable and contribute to the harm caused by cartel conduct. One has to target both in order to maximise deterrence, and each, on their own, encounter practical limitations. Furthermore, we should see corporate and individual liability in sanctions as mutually reinforcing each other. Theoretically, corporate liability should facilitate individual liability or accountability. If corporations are held liable, the theory is that they should then play their part in identifying the individuals in the corporation who are responsible for the conduct and take internal disciplinary measures against them. The law is not on its own in trying to fulfil that function. Equally, individual liability should facilitate corporate sanctioning. If there is liability against individuals and the threat of sanctions, then those individuals' interests and incentives will be aligned with co-operating with the authority to help gather evidence against and take corporate action against their corporate employer. Some jurisdictions, primarily the United States, uphold jail time as the most potent sanction against individuals. It seems there is a growing consensus that disqualification is a viable, workable and potentially potent individual sanction.

92. **The United States** explained that the question was whether the United States considers the possibility of private damages when the US sets fines or makes fining recommendations. First, it should be noted that the private cases almost always come after the government cases. Agencies don't know what the fines are going to be at the time they are making recommendations or judges are imposing fines. Second, the sentencing guidelines do not make reference to private damages or their effect on what the range of appropriate fines should be.

93. **The European Commission** explained why the rationale for the high fine in the trucks cartel. The cartel was of a very long duration, 15 years, and it also involved a high volume of sales. The case was a settlement decision, so they did not appeal the. The Commission did not consider the possibility of private damage claims when it set the fine. The delegate indicated that it felt that the position taken by the EC reflects a similar position to the US.

94. The Chair asked Professor Connor to comment on the questions and the answers. Professor Connor explained that it's a question that has intrigued him in his research career: What are the determinants of fines? And what makes some of them high and some of them low? He explained that his quantitative results indicated that both of the EC and the US act as if they knew there were going to be high private damages, and adjusted their fines accordingly. Professor Connor reflected that there appears to be estimation formed by the antitrust authorities as to how high the fines will be. The authorities then take into consideration when determining their fines. Professor Connor's results also indicated that United States fines have been influenced by the size of European Union

finer and vice versa. He commented on the question that was raised about the base fine in the US. The base fine is based on 10% of the affected commerce of the company during the entire collusive period. The data indicated in multiple publications on overcharges that the median average overcharge of cartels is closer to 25% than to 10%. The US Guidelines can therefore be considered as out of date and based on false information. Currently, the base fine is a 10%-20% range. The 20% was included to allow for the deadweight loss that's not accounted for in the overcharge and other punitive factors.

95. **Brazil** described its experience with the legislation, noting that the Brazilian competition act states eight criteria describing mitigating and aggravating factors. Brazil has more general standards or criteria stated in the law itself. As a consequence of case law, Brazil is able to detail the application of these criteria.

96. **South Africa** used the case of steel construction in South Africa to illustrate a case resolved by settlement with the parties concerned. The penalties are quite low relative to the gains that these companies make from these contraventions. South Africa noted that the involvement of government or ministers in processes and their involvement in this case was to seek remedies, and requested insights from Vani Chetty on this issue.

97. Vani Chetty opined that the question regarding fines is the reasonableness of the fine balanced with proportionality. In her view, the figures that have been put forward by Prof Connor are understood, the figures are based not on South African data, ones based on his research. The views articulated by Ms. Chetty are a result of having to look at administrative penalties on the one hand and now the emergence of criminal penalties. When criminal penalties was being mooted in South Africa, there was a public acknowledgement that this may compromise the leniency policy and it might affect the good work that's been done.

98. **BIAC** noted that with regard to whether there's any consideration given to the existence of private actions in the US, there is a provision of the leniency policy which requires the leniency applicant, in order to fulfil his conditions of leniency, to provide restitution to the parties that were injured. This restitution occurs when final leniency is granted which is essentially at the end of the DOJ's case. Regarding the interaction between the DOJ and the private parties, there is some tension. As a result, the DOJ is very concerned about its ability to prosecute other wrongdoers in the case. Because these private damage actions are filed very early and the private parties are seeking discovery, at the same time DOJ is continuing to prosecute, the DOJ is concerned that the private parties will interfere with their ability to gain evidence. BIAC mentioned the 25% study by Prof Connor which has been subject to discussion in the community

99. **Serbia** asked Professor Beaton-Wells if her alternative accountability will replace or supplement deterrence. The Serbian delegate also asked Professor Connor how he actually deter deadweight loss. Professor Beaton-Wells responded that she would not want to be understood as suggesting that accountability is a goal to replace deterrence. She suggested that she mentioned accountability in the break-out session as a particular objective or value that we might draw on in justifying individual sanctions on the grounds that to hold individuals to account or accountable for their actions is a foundational aspect of social control in any democratic society.

100. According to Professor Connor, there have been additional recent studies that have modified his original estimates by making technical corrections. Examining those alternative studies shows that the predicted overcharges even with various statistical corrections is still close to the 20% level. He explained that does not agree with the

premises that deterrence is dying out. It is true that the affected commerce numbers are being trimmed back by many jurisdictions because of appeals. On the other hand, there have been major revisions of the fining guidelines by many of the world's leading antitrust authorities. Professor Connor's overall impression is that the base fine percentages are being raised from 10% or some low number to 30-40%. Over the past ten years, aggravating circumstances are being given greater weight. Regarding the question of deadweight loss, Professor Connor stated that it can be viewed as harm to the market or harm to a group of consumers who cannot be identified. Therefore, when resetting the starting point of fines or the percentage fine, an authority may wish to increase it a little more just to allow for deadweight loss.

101. **Germany** asked the European Commission if the parents can, in the case where two parties, own a joint venture 50:50, be fined because the parents have an essential influence on the joint venture.

102. **The European Commission** responded that if there's participation of 100% or close to 100% then it can apply an assumption that there is decisive influence which can be rebutted by the undertaking. This position was also confirmed by the European Court of Justice, particularly in a 50:50 venture when it is most likely that both parents exercise decisive influence over the joint venture.

103. **Argentina** asked what a better level of detail to put in a law is and if Professor Lee could elaborate about the relationship between fines and private action for damages. Professor Lee explained that the amount of detail contained in a guideline has both pros and cons. Most of the undertakings expect the authorities to be equipped with detailed guidelines because of the transparency, expectations and foreseeability necessary for their own businesses. At the same time, providing detail has a negative side because it will limit the flexibility the antitrust authority needs to enforce its regulatory powers to deter any potential violations. The degree and the room for price increases caused by a price fixing scheme depends on the economic situation in each jurisdiction. The United States, where the market is competitive there will be sufficient room to increase the price by a large margin. However, in a small economy like Korea where many of the markets are already oligopolistic, they is already a relatively high price compared to a competitive level which means the real price increase by a price fixing scheme will be limited. Professor Lee believes there is no universal clear cut answer about a particular price that fixing can render. He added concerns about double fines for a single infringement by multinational firms is not yet fully mature.

104. **Malaysia** asked whether it is a good practise for a transition economy or young competition authority to practise allow instalment payments for companies that violate particularly in cartel cases. Professor Beaton-Wells responded that the question is tied to the issue of inability to pay which is an issue that many authorities have looked at. She noted that a scheme that allows for instalment payments can only be seen as a constructive and a beneficial approach to the issue of potential inability to pay as well as the associated issue of not wanting to ultimately have the effect of excluding firms from a market and thereby undermining the competitive process.

105. Replying to the question raised by Argentina, **Portugal** noted that some degree of orientation, and some degree of predictability should be given in the guidelines, but at the same time they should leave some flexibility to account for the particulars of each individual case.

106. **Korea** noted that in its jurisdiction, fines are so some argue that Korea needs to introduce class action and treble damage. The prevailing concern is that it might undermine the incentives to apply for leniency because companies should bear more financial burden if the class action and treble damages are introduced.

107. Professor Connor commented that the leniency programmes work best in countries that have relatively high expected fines because the benefit of destabilising the cartel, cheating on the cartel is great.

108. Professor Lee noted that the question is one of the very hot topics in Korea. The majority of academia strongly supports the introduction of class action. Resistance mainly comes from business arguing that it will hinder the effectiveness of the leniency programme or it will restrict excessively the freedom of business. He added that he does not agree with these arguments because it ignores the demand to protect the rightful interest of consumers and the citizens in the society.

109. **The United States** followed up on the question from Argentina on the level of detail in fining guidelines. According to Professor Lee's presentation, the United States guidelines are too vague, the north-east Asia guidelines are too detailed. The US believes that the proper approach is one in which the firms should be able to predict what the relevant fine. The US stressed that their guidelines do a pretty good job of meeting this objective, and are usually able to reach agreement with parties that want to negotiate a plea in a plea agreement. Professor Lee highlighted that there is a difference between legal history and background. In common law countries like the US, enforcement sometimes depends heavily on the negotiations between the parties. In many of the civil law countries like Korea, the ultimate goal of law enforcement is finding a justice. Therefore, when you depend upon the negotiation between the two parties, you may not need to detailed guidelines but in jurisdictions like Korea sophisticated guidelines may be required.

7. Concluding remarks

110. The Chair closed the discussion and invited panellists to make give concluding remarks.

111. Professor Connor noted that antitrust enforcement seems to have two great templates: the US criminal law model that has been adopted mainly in common law countries and the European Union's laws that have been adopted to a greater extent in many other jurisdictions around the world. He concluded that they are both fine models and they both work.

112. Professor Beaton-Wells highlighted the focus of this discussion was on sanctioning, which is a negative focus. One should not discount or overlook that the vast majority of companies want to do the right thing. The session did not really explore that, i.e. a positive focus on how to build on the genuine commitment of companies to comply with competition authorities. This could be a fruitful topic for another day.

113. Professor Lee noted that although the issue regarding antitrust fines can be devalued from the voices of the business community and other parts of government administration, increasing numbers of jurisdictions are adopting competition policy a strategy for development. As a growing numbers of competition authorities enforce competition laws, and impose significant fines, at least in theory, we should be ready to co-ordinate the proper role of competition authorities for each jurisdiction. The final goal

is global deterrence and the totalities of global sanctions should match the harm by the global violation. Vani Chetty highlighted that when it comes to the imposition of sanctions, there are principles: reasonableness, proportionality and fairness.

114. The Chair thanked the experts and the participants for their contributions and summarised the main points of the discussion. He noted that the pros and cons of authority discretion to calculate fines, the relationship between leniency and criminal sanctions, over and under-deterrence, and the necessity to have a method for calculating the fines. He concluded that all of these themes are very interesting and competition authorities should think about them carefully. Setting fines in conduct cases is one of the most difficult tasks facing law enforcers since there are so many variables to take into account. The Chair highlighted that there are two variables mentioned here that are worth taking into account when setting fines: proportionality and legal certainty. Proportionality tends to avoid over and under-deterrence. Legal certainty tends to avoid judicial review of authority's decisions. Both of them surely contribute to the improvement of the business environment which fosters economic development.

115. The Chair formally closed the session.