

SETTING FINES TO DISCOURAGE COMPETITION LAW VIOLATIONS
POLICY GUIDANCE TO STRENGTHEN THE INDONESIAN COMPETITION FRAMEWORK¹
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SUMMARY

- One of the main objectives of a competition framework is to discourage anticompetitive practices that can harm market performance, consumers and inclusive economic growth. Sanctions for infringers seek to incentivize compliance with the law but this can only be achieved if sanctions are stringent enough to deter anticompetitive business practices (sanctions outweigh payoffs from anticompetitive conduct), proportionate to avoid unnecessary negative effects on firm operations, and transparent to avoid excessive discretion that can undermine competitive neutrality among firms.
- In Indonesia, the low maximum value for administrative fines (IDR 25 billion), the silence of the law on the principles to set fines, and the lack of clarity on the institutional arrangement to impose sanctions weaken the effectiveness of the competition law.
- The Indonesian competition framework would be enhanced if the following amendments to the competition law are considered:
 1. Align the maximum administrative fine value to international standards by **setting a maximum of 10% of annual turnover of the business actor (whole economic group) in the year preceding the KPPU decision.**
 2. **Clarify the definition of business actor** so it comprises all legal entities which operate as a single economic unit in the market.
 3. **Introduce a provision in the law to state the elements to be considered by KPPU when setting fines:** affected turnover, duration and nature of the infringement, aggravating factors, and mitigating factors.
 4. **Clarify in the law that KPPU has the power to set administrative fines and execute them.**
 5. **Introduce the concept of settlement** to improve the efficiency of the enforcement process
- Once the competition law is amended, the respective regulations and guidelines for setting fines need to be updated.

¹ This note was prepared by the World Bank Group's Market and Competition Policy Team under the ongoing World Bank Group's engagement with the Government of Indonesia to contribute to the current discussion on the amendments of the law No. 5 of 1999 concerning the ban on monopolistic practices and unfair business competition.

A. Background

The main objective of imposing fines for competition law violations in most jurisdictions is deterrence. Deterrence can be intended to dissuade violators from engaging in the same conduct in the future (*specific deterrence*), as well as to dissuade other potential infringers from violating the competition law (*general deterrence*).² Other goals in imposing fines include the need to punish infringers (particularly cartel participants)³, recover any unlawful gains obtained through violation of the competition law⁴, restitution⁵ or retribution⁶.

Setting appropriate sanctions for infringements of competition law is key to encourage compliance with the law, and requires certain conditions regarding the contents of the law and stakeholders' understanding of its implementation. Four essential conditions for effective competition law enforcement include: a) competition law must be clear on the actions that qualify as infringements, b) the law must provide for the threat of appropriate sanctions, c) businesses that intend to infringe must perceive a high risk of detection by competition authorities given the powers granted to the authority, and d) there must be transparency and predictability to the greatest extent possible regarding the jurisdiction's competition law enforcement, so that market players can predict with a high degree of certainty what the consequences will be if they carry out actions that contravene the law.

The amount of the penalty necessary to deter depends on the profitability of the behavior in question; however, in practice, proxies are considered to set fines that are proportionate and effective. Optimal deterrence requires that the fine for a criminal violation be set at the social cost of the violation in question times the ex-ante probability of detection by the authorities.⁷ Since the necessary inputs into this equation cannot generally be calculated with certainty and without expending substantial costs in empirical analysis, the use of rough proxies for ability to harm the economy—such as a percentage of annual turnover—may be employed instead as a reference to set an appropriate fine.

In most jurisdictions, fines are one of a range of sanctions available to competition authorities: others include criminal or civil sanctions, which may be levelled against firms and or individuals, depending on the jurisdiction. Fines (financial penalties) are the main *administrative sanction* available under most jurisdictions, but there are other administrative sanctions - such as blacklisting for public procurement, recommendations to deny subsidies or tax exemptions, or banning managers of cartelized firms from managing another company for a number of year - available in different jurisdictions. Administrative

² Deterrence (general and/or specific) has been identified as one of the overarching objectives of the fining policy by the agencies of the EU, USA, Canada, Japan, Germany, the Netherlands, Switzerland, Brazil, France, Austria among others. According to international best practices, antitrust fines should pursue a twofold policy objective: (1) to impose penalties on infringing undertakings; and (2) to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.

³ For instance, the EU, USA, Germany, Brazil, Mexico, Korea and Austria.

⁴ For example, in Korea, recovery of illicit gains is quoted as the main objective of fining policy, alongside punishment.

⁵ **Restitution** is the concept of victim recovery – US and Canadian courts consider the need to provide restitution to any victims of cartels when determining appropriate fines.

⁶ **Retribution** is the concept of restorative justice that proportionate punishment is an acceptable response to crime, regardless of whether the punishment causes any tangible benefits. Retribution is a feature of the EU, Swiss, Italian and Jordanian fine setting frameworks, particularly in the case of cartels.

⁷ Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Polit. Econ. 169 (1968).

sanctions are usually issued directly by the competition authority. Though rarely imposed, *criminal sanctions* typically include incarceration of individuals involved in cartels⁸, and have as their objective increasing deterrence by focusing the attention of company managers on the extreme personal consequences of participating in cartels. Criminal sanctions can also include criminal fines. Criminal sanctions are typically issued by courts, upon application by the competition authority. *Civil/private sanctions* may be available in certain jurisdictions⁹ to recover damages for injured parties' monetary loss, either during the enforcement proceeding by the competition authority or separately in a civil action. To be successful, claimants must be able to prove the damage they suffered and the causality with the infringing party, which is often difficult. In some jurisdictions, competition authorities¹⁰ or courts¹¹ can impose fines on *natural persons* (individuals), that is the specific individual who committed the infringement, in addition to fining the undertaking. This approach also aims to enhance deterrence.

In order to ensure proportionality and avoid negative consequences of an excessively high penalty the common practice is to set a maximum limit for fines as a percentage of the turnover of the infringer's economic group. This cap aims to set fines that are too high and cannot be paid or that can jeopardize the viability of the company. Only in seldom cases, competition authorities have set a fine that reaches the maximum allowed fine for an undertaking.

Defining a clear and consistent methodology to determine individual fines for infringers ensures impartiality, enhances transparency and increases legal certainty for the private sector. The issue of transparency is not only related to good enforcement practice and openness of information but also to other factors such as the relationship between the predictability of sanctions and deterrence. Establishing a clear methodology to determine fines reduces the discretion of the authority and allows companies to assess *ex-ante* the consequences of breaching the competition law. In addition, a certain degree of predictability allows parties to be aware of the rationale and reasoning that led the authority to impose a specific fine, thus helping to make it more "acceptable" for its recipient. Furthermore, explaining the methodology used for the quantification of sanctions as part of the authority's decision facilitates full and effective judicial review if necessary.

B. Determining a fine

Fines for an infringement are generally calculated considering the harm caused by the anticompetitive practice under certain boundaries to ensure proportionality. Common methodologies to calculate fines tend to establish a number of sequential steps such as (1) calculating the baseline fine based on the gravity and duration of the infringement; (2) increasing this amount on the basis of aggravating circumstances; (3) decreasing the resulting amount on the basis of mitigating circumstances; (4) assessing whether the fine to be imposed respects the maximum level determined by the law; and, finally, (5) applying the discounts corresponding to the leniency program, settlements or due to the inability to pay (*see Table 1*).

⁸ Prison terms available for cartel offences usually run for a maximum of 5 years' imprisonment (e.g. Brazil, Canada, Hungary). Some jurisdictions include imprisonment with work (e.g. Japan).

⁹ Private actions are mainly used in Brazil, Canada, Ireland (the civil action can be taken in alternative or in addition), New Zealand, US, Switzerland and Japan.

¹⁰ For example, in Brazil, Canada, and Ireland fines for procedural breaches of the competition law can be imposed by the authorities on individuals.

¹¹ Courts in Japan, Jordan, South Korea, Mexico, Netherlands, New Zealand, Serbia, Turkey, USA and France can impose fines on individuals.

Table 1: Elements for setting individual fines and related legal instruments

Elements for setting individual fines		Usual instrument used to define the elements for a jurisdiction
Basic Fine	Proportional to sales in the relevant market for the infringement, duration of infringement, gravity of infringement	Competition regulations or guidelines
Increased by aggravating factors	For example, being a repeat offender, obstructing the investigation	Competition regulations or guidelines
Decreased by mitigating factors	For example, encouraged by government legislation/regulations	Competition regulations or guidelines
Subject to overall cap (maximum fine) per infringement	Generally, a percentage of annual turnover of the parent company (economic group)	Competition law
Fine reduction	Due to leniency, settlement, inability to pay	Competition law, and regulations or guidelines

Source: Adapted from WBG Markets and Competition Policy Assessment Tool

i. Overall cap for fines

Generally, competition laws state a maximum level of fine per infringement as a percentage of turnover or similar measure. The main advantage in setting fines as a percentage of turnover is that this tends to have a greater deterrent effect: particularly for larger undertakings, financial gains from the anticompetitive conduct may outweigh the maximum fine. Still some few jurisdictions such as Philippines and Myanmar (see Table 2), place a specific monetary cap on fines, although it has the disadvantage of becoming outdated due to inflation or economic growth and being less effective for larger firms, therefore reducing its effect as a threat for potential infringers.

In most jurisdictions, there are no minimum limits¹². Setting a minimum for fines might affect a competition authority's ability to set fines proportional to the harm caused by the infringement considering the affected market and the type of infringement. Setting minimum fines at a relatively high level could also affect the viability of the companies, especially those in sectors where net profit margins are generally lower.

The legal fine cap is set as a percentage of turnover, usually 10% of turnover, in most jurisdictions (See Table 2), but the definition of turnover can vary. It is important that the law is clear on: which entity's turnover it refers, what year or period it covers, and the scope of the turnover it involves. There are additional characteristics to define the concept of turnover more narrowly, for example whether it refers to the product-related turnover of the perpetrator of the offence, the total turnover of this company in the jurisdiction at hand, or even to the world-wide consolidated turnover of the group to which the perpetrator of the offence belongs.

- *Firm turnover*

The approach generally adopted across jurisdictions is to impose sanctions – mainly fines – on specific firms engaged in unlawful agreements, including liable parent companies. In several jurisdictions - including the EU, Hungary, South Korea, Switzerland and Turkey - a firm (undertaking or economic group) includes several different legal entities which by their structural and contractual links operate as a single

¹² Where minimum fines are provided, percentages or values tend to be low. For example, it is 1% of the relevant amount in China and Russia, and 0.1% in Brazil. In Germany, the minimum is EUR 5.

economic unit in a specific market. The consequence of this is two-fold: first, when attributing liability for an infringement, several legal entities belonging to the same undertaking or economic group may be held liable for the infringement. Second, any maximum fines apply to the whole undertaking (parent and subsidiary companies) and not to the individual company engaged directly in the infringement. The advantage of this approach is its deterrent effect, and it prevents the possibility of larger groups infringing the competition law via one of their smaller subsidiaries.

- *Global or local turnover*

Competition laws vary in terms of how they define turnover; in middle income economies thresholds are set in terms of the turnover generated in the country. Some jurisdictions, especially those where many global firms operate and where the turnover of the jurisdiction is important, use global turnover of the firm to set the fine threshold. This is the case in the EU and some European countries (e.g. Germany, UK, Netherlands, France). In most middle-income countries, the turnover refers to the turnover in the country. In the case of South Africa, the law even states that turnover includes local turnover and exports. In some few countries, the turnover threshold refers only to the product affected by the infringement. In order to increase transparency and clarity on the maximum fine, countries usually use the consolidated turnover for a firm according to its financial statements.

- *Period of the turnover*

It is important to define the period of the turnover considered as a threshold. Competition laws generally set the fine threshold in terms of the latest annual turnover in financial statements at the time of issuing the final decision. Some other jurisdictions consider the annual turnover the last year of the infringement or the year before initiating the investigation. Either option can work as long as it is clear in the law.

Table 2: Comparison of maximum fines for firms

Countries	Fine threshold for firms
Australia	The greater of \$10 m (approximately US\$7.5 m); or three times the total value of the benefits obtained if reasonably attributable to the conduct; or 10% of annual turnover attributable to Australia in the preceding 12 months
Brazil	20% of gross revenue of the firm (economic group) in the economic sector affected by the conduct, in the year prior to the beginning of the investigation
China	10% of the annual turnover of the previous fiscal year
EU	10% of the annual turnover of the previous fiscal year
Germany	10% of the annual turnover of the previous fiscal year
India	10% of the average turnover for the last three financial years
Indonesia	Administrative between Rp. 1 billion and Rp. 25 billion (approximately, US\$70k and \$1.85 million, respectively)
Japan	10% (large, manufacture), 3% (large, retailer), 2% (large, wholesale) of the sales amount of the relevant goods or services up to 3 years
Korea	10% of the turnover generated by the sale of relevant goods or services during the period of a violation
Malaysia	10% of the turnover over the period during which an infringement occurred
Mexico	10% of the previous year net income
Myanmar	Around US\$11,000
New Zealand	\$6.8 m; three times the total value of the benefits obtained and reasonably attributable to the conduct; or 10% of a nual turnover attributable to NZ

Countries	Fine threshold for firms
Philippines	Around US\$5 million
Russia	15% of the annual turnover of the previous fiscal year in the relevant market
Singapore	10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of 3 years
South Africa	10% of the annual turnover of the previous fiscal year
Thailand	10% of the annual income in the year that the offence is committed
Turkey	10% of the annual turnover of the previous fiscal year
UK	10% of the annual turnover of the previous fiscal year
USA	US\$100 m for a corporation (may be increased to twice the gain derived from the criminal conduct or twice the loss suffered by the victims if greater than \$100 m)
Vietnam	10% of the annual turnover of the previous fiscal year

Source: WBG Markets and Competition Policy Database, as of November 2017

Recommendations for Indonesia

- 1) Set a maximum fine of 10% of turnover of the infringing business actor in the year preceding KPPU decision and replace the current absolute maximum and minimum values.

Indonesia's current framework sets maximum and minimum limits for administrative fines of one billion and twenty-five billion rupiahs respectively. It is recommended that the minimum fine be removed to allow KPPU flexibility to issue proportionate fine, including token fines for smaller infringements. It is also recommended that the maximum fine be amended from an amount, to a percentage of total turnover, in line with international best practice. This will ensure greater proportionality between the infringement and the fine.

- 2) Clarify the definition of "business actor" in the law (Article 1(5)) in order to account for parent liability when setting a fine.

In Indonesia's law it is not clear whether the definition of business actor accounts for several different legal entities which operate as a single economic unit in the market. Making this adjustment in the law will enhance the deterrent effect of the fining structure but also facilitate the analysis of anticompetitive practices using the principle of single entity. The law could adopt the definition included in the UNCTAD Model Law on Competition¹³: "[Business actor] means firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them."

ii. Other elements to calculate the fine for a specific infringement

Aside from setting a maximum fine, some competition laws specify general principles of how to set fines. This includes stating that the fine has to consider the scope (turnover in affected market), duration (some countries cap the maximum number of years) and nature of the infringement (cartels usually imply a higher proportion of the affected turnover), and that aggravating and mitigating factors can be considered. Most of the details on the steps for calculating fines are included in regulations or guidelines.

¹³ Available at <http://unctad.org/en/conferences/UN-Set/7th-Review/Pages/Model-Law-on-Competition.aspx>

The European Union Fines Guidelines provide an example of how the considerations and criteria outlined in this note are used to set fines (see Box 1). A more detailed description of mitigating and aggravating factors can be found in Annex 1.

Box 1: European Union Fines Guidelines – DG Comp

BASIC FINE	<p style="text-align: center;">PERCENTAGE OF VALUE OF RELEVANT SALES (0-30%) X DURATION (years or periods less than one year) + 15-25% OF VALUE OF RELEVANT SALES: ADDITIONAL DETERRENCE FOR CARTELS</p>
INCREASED BY	<p style="text-align: center;">AGGRAVATING FACTORS e.g. ring leader, repeat offender or obstructing investigation</p>
DECREASED BY	<p style="text-align: center;">MITIGATING FACTORS e.g. limited role or conduct encouraged by legislation</p>
SUBJECT TO OVERALL CAP	10% OF TURNOVER (per infringement)
POSSIBLY FURTHER DECREASED BY	LENIENCY: 100% FOR 1st, UP TO 50% FOR THE NEXT, 20-30% FOR THIRD AND UP TO 20% FOR OTHERS
	SETTLEMENT: 10%
	INABILITY TO PAY REDUCTION

Source: http://ec.europa.eu/competition/antitrust/compliance/factsheet_fines_nov_2011_en.pdf

Recommendations for Indonesia

- 3) Incorporate a provision in the Law stating that the individual fines will be calculated considering the scope, duration and nature of the infringement as well as aggravating and mitigating factors;
- 4) Update current fining regulations and guidelines that explain the rationale, basis and methodology KPPU use to set fines: this would increase legal certainty about the factors to be used to determine fines and ensure greater objectivity, impartiality and predictability.

Per Indonesia’s competition guidelines, KPPU considers several aggravating and mitigating elements after determining the basic fine. Aggravating elements include continuation of the offence, recidivism, refusal to cooperate, and a party’s role in the offence i.e. whether they were the leader or initiator of the violation. Mitigating elements include termination of the violation, proof that the violation was not deliberate, limited participation, effective cooperation with KPPU, state action defense, and statements of willingness to change behavior by the parties involved. The inability to pay is an additional factor considered by several jurisdictions, including Indonesia – however it is important to note that provisions setting maximum fine levels at a certain percentage of turnover in Indonesia are understood as a method to consider ability to pay. The framework could be strengthened by reviewing (and expanding where appropriate) the range of aggravating and mitigating factors considered in setting the fine.

C. Interplay between fines, settlements and leniency

Settlements are an advantageous tool for administrative efficiency of competition authorities and to stop anticompetitive practices. Settlements allow for the termination of unlawful conduct reported by a perpetrator or under investigation and fine reductions. One of the advantages of settlement procedures is also to save human and financial resources that would have been invested by the competition authority to detect, find, and fine infringers. These resources are freed to deal with other cartel investigations, further increasing deterrence. Settlements also help stop anticompetitive conduct and limit harm for consumers. Admission of the infringement by firms can also eliminate the possibility of costly court cases. However, when considering the option of introducing settlement procedures, it is necessary to balance their possible drawbacks in terms of moral justice and deterrence, since infringer may be seen by the public as escaping appropriate punishment, with the expected benefits which can be gained through settlements. Transparency and predictability in settlement policy and process are critical to dispelling this public concern. In particular, penalties and sanctions imposed in settlement should continue to adequately reflect the seriousness of the settling party's conduct.

In jurisdictions where a reduction in fine cannot be obtained for leniency applicants other than the first, a settlement system must provide additional incentives, beyond that provided for under the leniency program, to induce firms to stop anticompetitive behavior. However, the possible reductions of fine that can be obtained from leniency and from settlement must be carefully balanced in order to ensure consistency and reciprocal strengthening between the two instruments. Should the reduction in fines for settlement be too high, compared with the one offered under the leniency program, cartel participants would refrain from applying for leniency. They would instead wait to see if the competition authority can bring a case against them. In the affirmative, they could always be in time to accept a settlement offer. In the negative, there would be no case. This is not an optimal situation from the policy point of view that a cartel should be found and sanctioned.

Recommendations for Indonesia

- 5) *Introduce a settlement framework in its competition law to strengthen the overall speed and efficiency of the enforcement process.*

D. Other sanctions

In addition to fines for firms, competition laws can establish fines and sanctions for individuals as well as criminal sanctions.

i. Fines on individuals

In some jurisdictions, competition authorities¹⁴ or courts¹⁵ can impose fines on *natural persons*, that is the specific individual who committed the infringement, in addition to fining the undertaking. This approach aims to enhance deterrence. In general, a distinction may be drawn on the one hand between cases where pecuniary sanctions can be imposed on any natural persons involved in cartel activity, and

¹⁴ For example, in Brazil, Canada, and Ireland fines for procedural breaches of the competition law can be imposed by the authorities on individuals.

¹⁵ Courts in Japan, Jordan, South Korea, Mexico, Netherlands, New Zealand, Serbia, Turkey, USA and France can impose fines on individuals.

those jurisdictions which target specific conduct of individuals. For instance, the Dutch agency may impose fines on natural persons giving instructions or exercising de facto leadership regarding antitrust infringements, including cartels. In Switzerland, pecuniary sanctions can be imposed on individuals whenever they intentionally fail to comply with an amicable settlement, a legally enforceable decision of the competition authority or a decision of an appeal body. In France, only those individuals that have played a major, fraudulent role in the infringement are liable to be fined by the courts. The Brazilian agency can impose administrative fines on managers directly or indirectly responsible for a cartel where their company was involved. While in some jurisdictions, such as Jordan, Ireland and Canada, individuals involved in cartel activity face the same fines as undertakings, in most cases pecuniary sanctions imposed on individuals are statutorily capped at a lower level, often at a fixed figure.

Recommendations for Indonesia

6) Clarify in the Law which sanctions apply to business actors and/or to individuals;

Indonesia's Competition Law defines business actor as "an individual person or company, in the form of legal or non-legal entity established and domiciled or engaged in activities within Indonesia". However, some sanctions (particularly those in Article 49) appear to apply to individuals rather than business actors.

ii. Administrative and criminal sanctions

In some jurisdictions, criminal sanctions can also be imposed in case of a competition law contravention. In these cases, there is need clarity on whether the administrative procedure or criminal procedure have to be completed first in order to set final sanctions, or whether they are independent. It is also important to clarify how can a criminal investigation start. In some jurisdictions, the competition authority requests a criminal investigation to be opened.

Recommendations for Indonesia

7) Clarify in the Law under what conditions a criminal investigation can be started and adjudicated, and through regulations or guidelines whether criminal and administrative fines can be imposed concurrently.

For example, the law could state that criminal sanctions be issued by the courts upon application of KPPU. This is particularly relevant to facilitate the implementation of leniency and settlements if they are included in the law amendments.

8) Remove or adjust section 46 (2) of the current law to clearly state that KPPU will directly issue final, binding administrative sanctions

The fact that currently the enforcement of the KPPU decision is done by the District Court (i.e. the execution of KPPU's decision must be requested from the District Court), affects the efficiency of the enforcement process and seems contradictory to article 47 of the current law.

iii. Complementary administrative sanctions

Other administrative sanctions can be applied in addition to fines. A common ancillary administrative sanction is debarment from bidding for public procurement contracts for a certain period – for example, in Brazil¹⁶, South Korea¹⁷ and Peru¹⁸. Several jurisdictions including Brazil, France and South Korea consider the publication of infringement findings as an additional measure to punish an offender. For example, in France, the Competition Council may order the publication, broadcasting or posting of its decision or of an extract in the manner it defines, and also order the inclusion of the decision or of an extract in the company’s own annual report – with costs of publication borne by the company. Several jurisdictions including Australia, Hong Kong, Lithuania, Mexico and Russia include provisions for disqualification of a former or current managing director from occupying certain posts or carrying out certain activities for a stated period. It is very uncommon for withdrawal of business licenses to be included as ancillary fines for antitrust violations – typically license revocation is a sanction for health, safety, or consumer protection violations. Moreover, from a competition perspective, such a sanction is generally not considered effective as it would exogenously reduce the number of competitors in a market. In the case of Brazil, the competition authority can also debar infringers from obtaining funds from public financial institutions for up to five years and recommend tax authorities to block the infringer from obtaining tax benefits. Such approach increases the potential losses of an infringer and therefore can enhance deterrence. Finally, other jurisdictions offer the possibility of issuing ancillary orders that aim at addressing the harm caused by the infringement.¹⁹

Several jurisdictions provide for ancillary administrative or criminal sanctions over and above administrative fines. *Table 3* provides examples of available ancillary sanctions from selected jurisdictions.

Table 3: Comparison of ancillary sanctions for firms

Countries	Ancillary sanctions
Australia	Director disqualification
Brazil	Debarring from participating in public procurement procedures and eligibility for subsidies, recommending withdrawal of tax exemptions
China	Director disqualification
EU	×
Germany	Debarring from participating in public procurement procedures
India	×
Korea	Debarring from participating in public procurement procedures

¹⁶ Article 24 of Law No. 8,884/94

¹⁷ Article 76.1 (3) of the Enforcement Decree of the Act on Contracts to Which the State is a Party

¹⁸ Article 237 of the Regulations of the State Procurement Law

¹⁹ In the case of UK, the ancillary orders are issued by a judge or magistrate. They depend on the seriousness of the offence and circumstances of the offender and are in most cases applied once sentencing/liability has been proven. The Sentencing Council of the UK defines ancillary orders as ‘other orders in addition to sentence imposed, that are aimed at redressing the harm caused by an offender, such as compensation orders; while others aim to prevent future re-offending, or repeat victimization including criminal behavior orders and exclusion orders.’ <https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/ancillary-orders/>

Countries	Ancillary sanctions
Malaysia	x
Mexico	Director disqualification
Myanmar	Temporarily or permanently close a business
New Zealand	Director disqualification
Philippines	x
Russia	Director disqualification
Singapore	x
South Africa	Director disqualification
Thailand	x
Turkey	x
UK	Director disqualification
USA	x
Vietnam	Revocation of the business registration certificates; deprivation of licenses and practicing certificates; confiscation of exhibits and means used for committing violations
Indonesia	Criminal: revocation of business permit; director disqualification for a maximum of 5 years

Source: WBG Markets and Competition Policy Database, as of November 2017

Recommendations for Indonesia

- 9) *Replace the current provisions in the Law of revocation of business permit with other administrative sanctions, as debarment for public procurement tenders, inability to access government subsidies, investment incentives or tax incentives.*

These additional sanctions are likely to increase the deterrence effect while not forcing the exit of the firm from the market, as it would be the case with the current option to revoke the business permit for competition infringements.

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Annex 1: Aggravating and mitigating factors

Different jurisdictions consider a range of qualifying aggravating and mitigating factors which adjust the basic fine amount. Aggravating and mitigating factors may appear in the laws or in guidelines detailing the application of these fine-tuning aspects. Aggravating factors work to increase the basic amount, while mitigating factors have the effect of reducing the fine. The main aggravating²⁰ and mitigating²¹ factors are summarized in Tables 3 and 4, including a selection of jurisdictions that take them into account.

Table 3: Aggravating factors considered in setting fines

Country	Duration*	Recidivism	Role in offence	Refusal of cooperation	Obstruction
Austria		Yes		Yes	
Brazil		Yes	Yes		
Canada	Yes	Yes	Yes		Yes
Czech Republic		Yes	Yes	Yes	Yes
European Union		Yes	Yes	Yes	Yes
France		Yes	Yes		
Germany		Yes	Yes		
Hungary		Yes	BA ²⁰	PF ²¹	PF
Ireland				PF	PF
Italy		Yes	Yes		Yes
Japan		Yes			
Jordan		Yes		Yes	Yes
Korea	Yes	Yes	Yes	Yes	Yes
Mexico	Yes	Yes	Yes		
Netherlands		Yes	Yes		Yes
New Zealand		Yes	Yes	Yes	Yes
Norway					
Russia		Yes	Yes	Yes	Yes
Serbia	Yes	Yes	Yes	Yes	
Switzerland		Yes	Yes	Yes	Yes
Turkey	Yes	Yes	Yes	Yes	Yes
USA		Yes			Yes

Only if duration is not considered in the basic amount of the fine.

"BA" indicates when the factor is considered at the calculation of the basic amount of the fine.

"PF" indicates when the factor does not necessarily affect the amount of the fine, but a separate procedural fine may be imposed.

Source: Setting Fines for Cartels in ICN Jurisdictions – International Competition Network 2008

²⁰ Some jurisdictions consider other aggravating factors including: whether the offence involved vulnerable victims (e.g. USA and Canada); the degree of premeditation (e.g. Mexico); the high ranking or seniority of the personnel involved (e.g. South Korea and New Zealand); the importance of the affected product or the overall financial/economic strength of the offender (e.g. Turkey); and, in Brazil, the "extent of damages or potential damages to competition, to the Brazilian economy, to consumers or to third parties."

²¹ Additional mitigating factors considered in some jurisdictions include: early admission of liability (e.g. New Zealand); the size of the firm (e.g. Japan); and any measures aiming at reducing the anticompetitive impact are considered attenuating factors in Italy.

Table 4: Mitigating factors considered in setting fines

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

⁴⁸ Not really applied in practice.

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

⁵⁰ Similar approach as the one of the European Commission above.

⁵¹ In the context of settlements.

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

Source: *Setting Fines for Cartels in ICN Jurisdictions – International Competition Network 2008*