COMMENTS OF THE AMERICAN BAR ASSOCIATION'S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW REGARDING THE ANTIMONOPOLY ACT STUDY GROUP REPORT ON THE SURCHARGE SYSTEM

The views stated in these Comments are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

June 29, 2017

I. Introduction

The American Bar Association Sections of Antitrust Law and International Law ("Sections") are pleased to offer these comments on the English translation of the Antimonopoly Act Study Group Report (Summary) ("Report Summary")[1] released for comment on April 25, 2017 by the Japan Fair Trade Commission ("JFTC") that outlines possible revisions to the surcharge system under the Antimonopoly Act ("AMA").

The Sections commend the JFTC for the continuing review of possible improvements and revisions to the surcharge system for AMA violations. The Sections have commented in the past on possible revisions in the surcharge system,[2] and appreciate that some of our suggestions are reflected in the Report Summary. We offer additional comments here in hopes of further assisting the JFTC to meet its important goal of transparent, fair and effective imposition of surcharges for AMA violations, particularly price fixing and bid rigging. The Sections and their members have substantial practical experience with the process and imposition of penalties/surcharges in the United States and internationally, and appreciate the opportunity to share our experience and perspective with the JFTC.

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1 The Sections have also obtained the English translation of the Report of the Study Group on the Antimonopoly Act ("Study Group Report"), which the Sections understand was released by early June 2017. However, because the Report Summary reflects the major areas in the Study Group Report on which the Sections have comments, and in the interest of time the Sections have not developed comments on all aspects of the Study Group Report, these Comments cite to the Report Summary except in the several instances where the Sections note specific aspects of the Study Group Report.

2 In 2016, the Sections submitted comments (the "2016 Comments") on the "Summary of Issues Concerning the Modality of the Administrative Surcharge System," which were published for comment by The Study Group on the Antimonopoly Act ("Study Group") convened by the JFTC. The 2016 Comments included a discussion of "General Principles on the Use of Surcharges in Competition Law Cases," as well as a section on "Due Process" including the "Attorney Client Privilege and the Right of Counsel to Attend Witness Interviews." The Sections have also submitted comments (the "2014 Comments") on the attorney-client privilege in response to the issues raised by the JFTC in the Summary of Issues of Administrative Investigation Procedures under the Antimonopoly Act issued by the Cabinet Office in 2014. Both the 2016 and 2014 Comments are attached as appendices for ease of reference and incorporated by reference.

II. Executive Summary

The Sections commend the recognition of the need to revise the surcharge system and reaffirm their support for granting discretion to the JFTC in imposing surcharges, and for broadening the eligibility for mitigation of surcharges. The Sections commend the Study Group's support of guidelines, and recommend that such guidelines be clear. The Sections respectfully recommend that clear guidelines be established regarding what levels of cooperation will justify surcharge reductions.

The Sections commend the adoption of the principle that the surcharge system should be designed to achieve deterrence by imposing monetary penalties greater than the amount of the unjust gains, taking into consideration the probability that the offender's misconduct will be detected and punished. However, the Sections respectfully submit that surcharges are appropriate only for hard-core cartel conduct (*e.g.*, price fixing, market allocation, bid rigging) and may be inappropriate for other types of infringements of the AMA. To the extent any surcharges are imposed on non-cartel violations, such surcharges should be based on a thorough analysis of the violation's competitive effects and a quantification of the actual competitive harm that the violation has caused.

The Sections commend the proposal to abolish calculation rates by type of business and suggest that the small and medium-sized enterprise calculation rate should also be abolished. The proposal to impose higher surcharges on repeat offenders and those with leading roles in infringements is commendable. However, the Sections respectfully suggest that compliance system arrangements and ability to pay should be considered mitigating factors. The Sections are unaware of any principled competition law basis for exempting a "small scale" cartel from surcharges.

The Sections support empowering the JFTC to sanction obstructive conduct by targets of investigations beyond existing penalties only if there are clear guidelines as to the circumstances in which an additional surcharge may be imposed, and if judicial review is available.

The Sections continue to urge that procedural safeguards will not undermine "the fact-finding ability" of the agency, but will enhance it by enabling the JFTC to consider – and accept or reject – the viewpoints that the parties present. The Sections respectfully urge that any refinements to the AMA enforcement system ensure procedural safeguards for any party subject to the JFTC's investigations, by incorporating the best practices that have widely been accepted by competition law enforcement regimes worldwide. The Sections respectfully suggest that effective enforcement can be achieved only if adequate procedural safeguards are provided.

The Sections respectfully continue to urge the adoption of the attorney-client privilege. The Sections believe that the attorney-client privilege in fact does not materially impede fact-finding by enforcers. The Sections respectfully submit that any questions relating to the appropriate scope of attorney-client communications should be adjudicated by a third party such as a court, instead of the JFTC. The Sections continue to respectfully urge that an attorney be permitted at a deposition or interview as a matter of fairness, to facilitate the provision of complete and accurate information to the JFTC, and to conform to international norms of due process. The swift, efficient,

and fair operation of the system would be enhanced, not hindered, if there were a greater recognition of the due process rights of the entities or individuals under investigation.

For ease of review, the Sections have organized these comments to correspond to the topic headings in the Report Summary.

III. Specific Comments

1. Revision of the Surcharge System (Overview)

(1) The need for revision of the surcharge system (problems with the current surcharge system)

The Report Summary notes that the compulsory manner under which surcharges are currently imposed does not allow the JFTC to calculate or impose an appropriate surcharge on a case-by-case basis taking into account relevant factors such as the nature of the infringement. Moreover, the lack of flexibility hampers the JFTC's ability to incentivize significant cooperation and to discourage lack of cooperation. The Sections reaffirm their support for granting discretion to the JFTC in imposing surcharges, and for broadening the eligibility for mitigation of surcharges.[3]

(2) The direction and policy of revision of the surcharge system (Improvement measure and policies on the premise of the problems)

The Report Summary notes that changes to the surcharge system should include: "(a) a system where certain requirements are delegated to Cabinet Order etc. or (b) although the requirements are to be stipulated by law, a system where the JFTC can make a decision on a case by case basis by its specialized knowledge...."[4]

The Sections reaffirm their support for some discretion for the JFTC. The key principles are: (1) the JFTC should have discretion to incentivize cooperation; (2) the discretion should be within a specified range; and (3) the JFTC should be transparent about the range and how it is being applied. Clear guidelines should be established regarding what levels of cooperation will justify surcharge reductions. Such guidelines should incorporate two important criteria: (a) timeliness; and (b) the value to the investigation of the cooperation. The Sections take no position on the advisability of specific discount amounts, but recommend that the JFTC be given discretion to give discounts within ranges.[5]

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3 *See* 2016 Comments, pp. 3, 10-11.

4 Report Summary, p. 2.

5 2016 Comments, pp. 11-12.

2. Individual plans for the system design

(1) Legal nature of the current surcharge system

The Report Summary rightly notes that the surcharge system should be designed so that deterrence is achieved by imposing monetary penalties greater than the amount of the unjust gains. However, the Sections believe penalties should not simply require the violator to disgorge the unlawful profits. The Sections submit that sanctions should take into account both (1) the full level of the quantifiable social costs of the AMA infringement, and (2) the probability that the offender's misconduct will be detected and punished.[6] In particular, cartels, as agreements generally reached in secret, may never be detected, so that the penalties imposed must be significant enough to act as a specific deterrent to the violator and as a general deterrent, considering that would-be offenders calculate that there is some chance they will not be caught.

(2) Scope of amount of sales for the basis for calculation of surcharges

The Report Summary proposes that the basis for calculation of surcharges be changed "so that the whole amount of sales of products subject to infringements (hereinafter, 'basic amount of sales') shall be established as a new basis for calculation of surcharges."[7] This approach is consistent with the United States Sentencing Guidelines, which provide the framework for calculating fines in U.S. federal courts for violations of federal law. The U.S. Sentencing Guidelines provide that virtually all fines in cartel cases are set using the following methodology: the calculation starts with a "base fine" of 20% of "the volume of commerce attributable to an individual participant in a conspiracy . . . in goods or services that were affected by the violation."[8]

However, these calculations and proxies are appropriate only for hard-core cartel conduct (*e.g.*, price fixing, market allocation and bid rigging) for which there is universal agreement that there is no redeeming pro-competitive benefit. Indeed, in the United States, criminal fines are imposed only in cases involving hard-core cartels.[9] As discussed further below, the Sections

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6 2016 Comments, p. 6. This punishment may take the form of criminal fines and administrative surcharges, as well as civil damages.

7 Report Summary, p. 3.

8 U.S.Sentencing Guidelines at § 2R1.1. There is some imprecision in the term "affected commerce" but it is well established that the government does not have to prove that each sale of the product subject to cartel conduct was affected by the agreement and, if so, by how much. A proxy of 20% is used to begin the calculation of the fine once the affected commerce is determined. This figure is then adjusted by a culpability score that is based on such factors as the size of the organization within which the violation occurred, whether high-level personnel within that organization participated in, condoned, or were willfully ignorant of the offense, whether the company has any history of misconduct, and whether the company impeded or obstructed the investigation. The final culpability score translates into minimum and maximum multipliers that are applied to the base fine. For example, if the base fine is $10 million and the culpability score is 6, the minimum and maximum multipliers are 1.2 and 2.4, and the minimum and maximum fine range is $12 million ($10 million x 1.2) to $24 million ($10 million x 2.4). 2016 Comments pp. 13-14. *See* U.S. Sentencing Guidelines at §§ 8C2.5, 8C2.6.

9 U.S. Sentencing Guidelines, §2R1.1 (Background) (2015), *available at*

submit that surcharges are inappropriate for other types of infringements of the AMA. Other remedies, such as injunctive relief, may be more appropriate in those situations.[10]

(3) Calculation period of amount of sales serving as basis for calculation of surcharges

The Report Summary proposes that the current period for calculating sales as the basis for the calculation of surcharges be abolished. The new "calculation period shall be from the date on which the enterprise began to engage in infringement to the date on which it stopped engaging in it."[11] The calculation period would be expanded from the current three-year period to "backdating ten years from the date on which the JFTC started to investigate."

The Sections agree that the current three-year upper limit of the calculation period may be inadequate to deter cartel conduct, and suggest a five-year limit, as reflected in the 5-year statute of limitations for prosecutions of violations of the Sherman Act in the U.S.

(4) Basic calculation rate of surcharges

The Report Summary indicates that the level of surcharges should be raised, for example, by extending or abolishing the upper limit of the calculation period of the amount of sales serving as a basis for the calculation of surcharges, because the current level of surcharges is insufficient to deter infringements. The Sections agree that to the extent the current level of surcharges is insufficient deterrent to cartel conduct, the level should be raised as to those offenses. The revisions discussed should allow for greater surcharges to be assessed, serving the goal of deterrence, while still maintaining proportionality in punishment.

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http://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-2-l-x#NaN. The U.S. Sentencing Guidelines' description of which competition law violations are prosecuted criminally is consistent with the definition of hard-core cartel conduct adopted by both the Organisation for Economic Co-operation and Development ("OECD") and the International Competition Network ("ICN"). *See* OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, OECD Document No. C(98)35/Final (May 14, 1998) ("OECD Recommendation"), at 2(a), available at: http://www.oecd.org/daf/competition/2350130.pdf; ICN, Building Blocks for Effective Anti-Cartel Regimes, Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties, (June 2005) ("ICN Defining Hard Core Cartel Conduct") at 12, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf.

[10] 2016 Comments, p. 9; Sections' Comments on the Prospective Amendments to Japan's Antimonopoly Act, Mar. 2008 ("2008 Comments") at 2-3, *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_japan.authcheckdam.pdf.

[11] Report Summary, p. 4.

(5) Calculation rates by type of business

The Sections commend the Report Summary proposal to abolish calculation rates by type of business. There is no rational basis for distinguishing between types of businesses when imposing surcharges.[12]

(6) Small and medium-sized enterprise calculation rate

On the other hand, the Report Summary proposes that the small and medium-sized enterprise calculation rate shall be maintained. The Sections respectfully suggest that (subject to ability to pay considerations, referenced below, and the exercise of prosecutorial discretion) there is also no rational basis for distinguishing between small and medium sized enterprises and a large enterprise when imposing surcharges. It is inconsistent with the principle of proportionality and may, in practice, fail to reflect the offending party's culpability.[13] Moreover, as the Report Summary notes, it is sometimes hard to distinguish between the different types of enterprises.[14] Requiring this determination only adds a level of complication and potential for error based on a distinction that serves no valid purpose. The determination of the amount of sales for the basis of calculation of surcharges will effectively make a distinction based on an appropriate measure, i.e. the sales that were affected by the unlawful agreement. If a small firm (however determined) cartel participant affected more sales than a large firm participant in that cartel, then the surcharge for the small firm's violation should be greater both as a matter of fairness and deterrence.

(7) Aggravation/mitigation of surcharge

The Report Summary indicates that "[f]rom the perspective of more effective deterrence of infringements, higher calculation rate for repeated infringements and leading roles in infringements shall be maintained: a uniform rate of 1.5 multiplied by the basic calculation rate, based on the fact that unjust gains of violators on these cases are about 50% larger than on other general cases."[15] The Sections agree that a repeat offender should be subject to a heavier surcharge since apparently the surcharge for the initial violation was insufficient to deter the unlawful conduct. While the Sections also agree that those who took leading roles in infringements should be subject to a higher surcharge than those who had minor roles, it is unclear that repeat offenders or leaders reap 50% larger unjust gains than others and therefore should be subject to the higher calculation rate of 1.5 times the basic rate.[16]

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12 2016 Comments, p. 14.

13 *Id*.

14 Report Summary, p. 5.

15 Report Summary, p. 6.

16 The Sections note with interest the Study Group's finding that "average unjust gains of repeated infringements were estimated at 16.5%, and those of leading roles of infringements were at 15.9%." Study Group Report, p. 27.

The Report Summary also states, however, that neither compliance system arrangements nor lack of ability to pay would be considered a mitigating factor. The Sections agree that the mere existence of a compliance program should not be a mitigating factor. However, if a company can demonstrate that its compliance program was reasonably designed, implemented, and enforced[17] or that it has taken proactive steps to improve the program's effectiveness and prevent future violations, appropriate credit should be given. This also will motivate more businesses to adopt robust compliance programs and to continue to evolve them to ensure their continued effectiveness.

Similarly, the Sections submit that it is generally not a procompetitive outcome for a penalty to be so heavy as to put a firm out of business.[18] Moreover, to the extent the retention of the special small and medium-sized enterprise calculation rate is based upon a concern about the ability of such enterprises to pay a greater surcharge,[19] the Sections respectfully submit that directly incorporating the ability to pay as a mitigating factor is a more effective way to address that concern.

(8) System to increase incentives to cooperate in investigation

The Report Summary recommends that in order to increase the incentives to cooperate, "a system shall be established under which the JFTC can reduce the amount of surcharges according to the value of proof which suspected violators have voluntarily submitted."[20] Among the specific recommendations are:

- the maximum number of leniencies granted in an investigation will be abolished and there will be a flexible reduction rate within a range based on cooperation;
- the cooperation must be continuous; and
- A predetermined rate shall be added to the surcharges pertaining to the infringements of substantive provisions by the violator for cases of obstruction.

The Sections agree that such a revised system should increase incentives to cooperate in an investigation. Companies inclined to cooperate with enforcement might do so, knowing that their efforts could be rewarded in the form of reduced penalties and quicker resolution of any

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17 2016 Comments, p. 12.

18 2016 Comments, p. 15. *See* ICN Defining Hard Core Cartel Conduct at 63. The U.S. Sentencing Guidelines §§ 8C3.3(a), 8C3.3(b) provide for consideration of the impact of a fine on a defendant's "ability to make restitution to victims" and on "the continued viability of the organization." The U.S. has reduced antitrust fines in order not to endanger a company's ability to continue as a viable competitor. *See*, *e.g.*, Seth C. Farber, Jeff Litvak, Lauren E. Duxstad, and Geoffrey Ihnow, "Criminal Antitrust Fines and Penalties: Reductions Based on Ability to Pay," Antitrust (Spring 2017), available at https://www.americanbar.org/content/dam/aba/publications/antitrust_magazine/anti_spring2017_farber.authcheckdam.pdf.

19 Study Group Report, pp. 23-25.

20 Report Summary, p. 6.

investigation. The JFTC may therefore complete its investigations more expeditiously.[21] Again, the Sections, while recognizing the need for flexibility, respectfully recommend that clear guidelines be established regarding what levels of cooperation will justify surcharge reductions.[22]

The Sections also agree, however, that cooperation must be continuous to qualify for a reduction in surcharge. As the ICN has noted: "in order to be most effective, the cooperation requirements contained in a settlement should be ongoing obligations and the government should be able to void the settlement for failure to comply with the cooperation obligations, even after the sentence or penalty is imposed."[23] The U.S. Department of Justice requires that companies receiving fine discounts for cooperation in cartel cases must cooperate throughout the pendency of the investigation. The value of the cooperation is diminished, perhaps to nothing, if a company ceases to cooperate before an investigation is complete.

(9) Direct settlement system

The Sections have no comment regarding the Report Summary conclusion that a system of direct settlement, which the European Commission adopted in 2008, shall be shelved at this time and revisited after experience with the new surcharge system.

(10) Imposition methods

The Report Summary discusses (a) delegation within limits to the Cabinet or the JFTC; (b) deferring possible provisions for not imposing surcharges in monopolization cases until there is some experience with the new system; and (c) maintaining the exemption due to small scale (under one million yen).

As noted earlier, discretion will enable the JFTC to ensure efficiency in investigation by securing the maximum amount of early cooperation, and the Sections believe that monopolization, and any infringement other than cartel behavior, should not be subject to surcharge penalties. The Sections are not aware of any principled competition law basis for exempting a "small scale" cartel from surcharges or that the harm to victims of a "small scale" cartel is of less concern than larger cartels. The Sections are unaware of any basis for the apparent assumption that "small scale" cartels inflate prices less than larger cartels. If the relevant market is small, a "small scale" cartel

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21 2016 Comments, p. 10. In fact, the proposed Trans-Pacific Partnership requires the JFTC to adopt commitments procedures for non-cartel conduct that would provide incentives for companies under investigation to cooperate with the investigation and offer remedies to avoid findings of a violation. Study Group Report, p. 36.

22 2016 Comments, p. 11.

23 *See* ICN Cartel Settlements at 23.

may have the ability to raise prices proportionately more than a larger cartel in a far larger relevant market.[24]

(11) Different provisions for different types of infringements

The Sections commend the recognition in the Report Summary that there should be consideration of different surcharge provisions for different types of infringements that are not subject to the current surcharge system.[25] Indeed, even beyond the administrative difficulties identified in the Report Summary,[26] there seems little principled basis for applying the same calculations for a surcharge for abuse of superior bargaining position as for a cartel.[27] As discussed above, the Sections urge that only cartel behavior should be subject to this surcharge system.[28] To the extent any surcharges are imposed for non-cartel violations, they should be based on a thorough analysis of the violation's competitive effects and a quantification of the actual competitive harm that the violation has caused.[29]

(12) Relationship between surcharges, criminal penalty and civil damages

The Report Summary indicates that "[s]ince the new revised system mentioned in this report shall be designed within the scope of the purport and the objective of the current surcharge

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24 Again, to the extent the motivation for exempting "small scale" cartels is concern for small and medium sized enterprises (Study Group Report, p. 36), the Sections suggest that including ability to pay as a mitigating factor is a more effective way to address the concern.

25 Moreover, the Study Group Report notes that "for conduct other than cartel and bid-rigging, it can be assumed that such conduct shall be a subject to the commitment system prescribed in the TPP Agreement Arrangement Act, enacted on December 9, 2016" and "with regard to conduct other than cartels and bid-rigging, efficient and the effective solutions for cases can be expected through this new system." Study Group Report, p. 36. In these circumstances, there is even less reason to consider surcharges for non-cartel offenses.

26 Report Summary, p. 8.

27 2016 Comments, pp. 8-9. In their 2008 Comments at 5, the Sections noted that "the abuse of superior bargaining position can be very difficult to identify correctly" and "adding the risk of surcharges … may unintentionally deter procompetitive transactions that would have ultimately benefited consumers." *See also*, Organisation for Economic Cooperation and Development, Remedies and Sanctions in Abuse of Dominance Cases (2006) at 41, *available at* http://www.oecd.org/competition/abuse/38623413.pdf. Moreover, it appears that a reason for postponing consideration of any adjustment in the treatment of abuse of superior bargaining position is that "there are many cases on abuse of superior bargaining position under trial" and "the costs of investigation/lawsuit are so immense that the arrangement of a variety of methods are necessary in order to promptly exclude infringements because of legal dispute over that practice and interpretation of the provisions." Report Summary, p. 8; Study Group Report, p. 38. Unless this backlog is expected to clear in the near future, the Sections respectfully submit that the existence of the backlog is reason to make adjustments now, instead of to delay consideration of adjustments until the backlog is resolved.

28 2016 Comments, p. 9.

29 *Id*. In the 2008 Comments, the Sections also suggested that if the JFTC decides to introduce surcharges to cover unilateral conduct, it should consider a system "to avoid unduly discouraging aggressive but beneficial competition in the marketplace." 2008 Comments at 2-3.

system, systems on current criminal penalties, such as dual liability provisions and criminal penalties for individuals, shall not be amended."[30] Also, "[p]rovisions for adjusting surcharges and civil damages shall not be established."[31] The Sections note that the U.S. antitrust enforcers do consider the likelihood and extent of civil damages in imposing some types of remedies, such as disgorgement of unlawful gains, for antitrust violations.[32]

(13) Penalties for obstruction of investigations

The Report Summary indicates that the "introduction of administrative monetary disadvantage measures against obstruction of investigations shall continuously be examined, looking at the operational status of the new system." The Sections support empowering the JFTC to sanction obstructive conduct by targets of investigations beyond existing penalties only if there are clear guidelines as to the circumstances in which an additional surcharge may be imposed, and if judicial review is available.[33]

(14) Due process under the new revised system

(i) Overview

The Report Summary contemplates that "[s]hould the effectiveness of law enforcement be hindered by protecting due process beyond the required extent, it would eventually cause damage to the benefits of general consumers."[34] The Sections continue to urge that procedural safeguards will not undermine "the fact-finding ability" of the agency, but will enhance it by enabling the JFTC to consider – and accept or reject – the viewpoints that the parties present.[35] The success of any program that gives the JFTC the power to determine surcharge levels will depend on the JFTC's ability to exercise its judgment in a way that is consistent, predictable, and transparent. In

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30 Report Summary, p. 8.

31 *Id*.

32 *See, e.g., United States v. Keyspan Corp.*, 763 F. Supp. 2d 633 (S.D.N.Y.2011); *FTC v. Endo Pharm.*, No. 2:16-cv-1440, 2016 WL 1253815 (E.D. Pa. 2016). The U.S. also considers victim compensation payments in determining ability to pay fines.

33 2016 Comments, pp. 12-13. It is important that the procedures for investigating and imposing administrative disadvantage measures be consistent with due process. For example, the bases for imposing any monetary disadvantage should be clearly defined. The monetary disadvantage imposed should be proportionate to the extent of the obstruction. Also, procedural safeguards, such as strict evidence rules, rights to counsel, and adjudication by neutral magistrates, should be provided. The Sections understand that such safeguards would be consistent with AMA Articles 94 and 95.

34 Report Summary, p. 9.

35 *See* Abbott B. Lipsky, Jr. and Randolph Tritell, "Best Practices for Antitrust Procedure: The Section of Antitrust Law Offers Its Model," Antitrust Source (December 2015) at 4-10 ("Antitrust Section Best Practices"), attached as an Appendix and *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec15_lipsky_tritell_12_11f.authcheckdam.pdf.

fact, as a discretionary surcharge system creates substantial incentives for parties to cooperate with investigations, due process protections for all parties will allow the JFTC to protect against potentially overzealous cooperation[36] while benefiting fully from the incentives to cooperate.

Due process rights and procedures that promote the impartiality, efficiency, and accuracy of antitrust decisions help achieve competition law goals. As the U.S. Supreme Court has observed, "[i]t is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what "scientific method" is to science.'"[37] The Sections respectfully urge that any refinements in the AMA enforcement system ensure procedural safeguards for any party subject to the JFTC's investigations, by incorporating the best practices that have widely been accepted by competition law enforcement regimes worldwide. The Sections respectfully suggest that effective enforcement can be achieved only if adequate procedural safeguards are provided.[38]

(ii) Preliminary procedures

The Report Summary indicates that the existing procedures for a hearing of opinions under Article 49 of the AMA are sufficient to protect the rights of parties even if a system to increase incentives to cooperate is introduced, so no revision is deemed necessary. The Sections respectfully refer to their comments above.

(iii) Attorney-client privilege

The Report Summary concludes that there should be no change in the treatment of the attorney-client privilege under any new surcharge provisions because there were no concrete examples found that enterprises have suffered from lack of "so called" attorney-client privilege. The Sections respectfully submit that enterprises have suffered harm by being unable to seek legal advice based on complete candor with their counsel because such communications are not privileged.

The Sections respectfully continue to urge the adoption of the attorney client privilege.[39] Recognizing the attorney-client privilege would contribute to the rule of law in Japan's

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36 *See, e.g.*, Report Summary, p. 10 ("concerns of catering to the JFTC's investigation policy and the resulting false accusations caused by the introduction of the surcharge aggravation/mitigation according to the degree of cooperation"); Study Group Report, p. 50.

37 *Application of Gault*, 387 U.S. 1, 21 (1967), *citing* Foster, *Social Work, the Law, and Social Action*, Social Casework, July 1964, pp. 383, 386.

38 2016 Comments, pp. 3-5.

39 The Sections are mindful that the attorney-client "privilege is not acknowledged under the current Japanese legal system and legal theory" (Report Summary p.10) and respectfully suggest that while it would be ideal for the privilege to be adopted universally in Japan in one step, it is nonetheless preferable to adopt it step-by-step than to continue to reject it where such universal adoption appears difficult to achieve in the near term. Moreover, the Sections understand that Japan's Code of Civil Procedure Arts. 197(1), 220 and Code of Criminal Procedure Arts. 105, 149 provide some confidentiality to attorney-client communications, with the goals of fostering the attorney-client relationship and ensuring the right to effective assistance of counsel,

competition law enforcement system by (1) fostering the attorney-client relationship, (2) encouraging client candor, (3) fostering voluntary legal compliance, (4) promoting efficiency in the legal system, and (5) enhancing the right to effective assistance of counsel.[40]

The Sections believe the attorney-client privilege in fact does not materially impede fact-finding by enforcers.[41] First, the privilege is focused, shielding only the confidential communications between a client and counsel for the purpose of seeking legal advice. It does not protect the underlying facts (even if communicated to counsel) or other types of communications that would not be covered by the privilege, from being discovered and used in prosecutions, such as communications that were not made for the purpose of obtaining legal advice, including communications made in furtherance of misconduct or of business objectives, or that were not made in confidence.[42]

Moreover, recognizing the privilege actually promotes observance of the law and the administration of justice by encouraging businesses to investigate and correct possible wrongdoing. The purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients," which, in turn, has a profound and beneficial effect on the overall system of justice.[43] The most effective way of eliciting true and unvarnished communication is to do so in confidence so as to eliminate any inhibition or apprehension by a client in relaying his or her case to his or her lawyer. A client is unlikely to extend his or her complete trust to his or her lawyer if a confidence is not protected and must be shared with other

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and respectfully submit that the attorney-client privilege is a sound extension of these current protections to further these goals.

40 2016 Comments, p.5; 2014 Comments, p.3; "Report Issued by the Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act" ("Advisory Panel Report") at 17, *available at* http://www8.cao.go.jp/chosei/dokkin/finalreport/body-english.pdf.

41 The Study Group appears to be concerned that "there are quite a few suspected infringement cases of the AMA where attorneys gave such instructions as ① a method to avoid a deposition record from being created = to take notes, ② to take the attitudes of "don't remember anything" and "don't know" as soon as entering the JFTC, ③ to change the personality, not to answer earnestly, to hold the stance of "don't know, don't understand, don't remember", and ④ to resist to the bitter end or not to say anything." Study Group Report p. 50. While abuse of any privilege occurs, the U.S. has developed a substantial body of standards and procedures in the rules of professional conduct and rules of evidence that has, the Sections believe, achieved a sound balance between due process and enforcement. Indeed, the Study Group notes that "[w]hen cases of attorneys providing non-cooperative advice, including concealment of evidence,…the JFTC needs to actively request for disciplinary actions to the bar associations to which the attorneys concerned belong. In addition, when the JFTC operates with consideration given to the privilege, the Japan Federation of Bar Associations is expected to respond to the operation and take measures to make the attorney disciplinary system function more effectively." Study Group Report, p. 49. The Sections respectfully submit that such a balance of due process and enforcement is a better approach than to exclude consideration of employee depositions in the calculation of mitigation of surcharges because of fears of overzealous cooperation. Report Summary, p. 10; Study Group Report p. 50.

42 *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981). *See also* 2014 Comments, pp. 2-4.

43 *Upjohn Co. v. United States*, 449 U.S. at 389.

parties, including the opposing party and the judicial body itself. Enabling a lawyer to hear all of the facts, facilitated by the protection of privilege, allows the attorney to formulate an effective legal strategy and offer sound legal advice based on the totality of the facts and circumstances.[44]

The Report Summary also concludes that "it is appropriate for the JFTC to take care of the only communications between attorneys and their clients (enterprises) related to the use of the new leniency program to the extent that the fact-finding ability of the JFTC should not be impeded, on the premise of establishing measures to prevent adverse effects such as concealing evidence, etc."[45] The Sections respectfully submit that any questions relating to the appropriate scope of attorney-client communications should be adjudicated by a third party such as a court, instead of the JFTC, to ensure an objective evaluation of the impact of the communications on the JFTC's fact-finding ability and the likelihood of the concealment of evidence in the particular circumstances.[46]

(iv) Rights of defense in deposition procedures

The Report Summary also indicates that the rights of defense in deposition procedures should not be enhanced because it may impede the fact-finding ability of the JFTC.

The Sections continue to respectfully urge that an attorney be permitted at a deposition as a matter of fairness, to facilitate the provision of complete and accurate information to the JFTC, and to conform to international norms of due process.[47] The ICN's Guidance on Investigative Process ("ICN Guidance")[48] provides that "[p]arties should be allowed to be represented by counsel of their choosing during the investigation."[49]

Moreover, it is difficult to see how permitting the taking of notes during the deposition would impede the JFTC's fact-finding ability to any significant extent. On the other hand, accurate notes should be helpful to ensure that interviews were properly conducted, and it is very difficult to take accurate notes relying on memory during a recess.[50]

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44 2014 Comments, p.5.

45 Report Summary, p. 10.

46 *See, e.g.*, *United States v. Osborn*, 561 F.2d 1334 (9th Cir. 1977); *In re Bonanno*, 344 F.2d 830, 833 (2d Cir. 1965).

47 2016 Comments p.5. For example, an attorney would help ensure that a witness's rights, such as the privilege against self-incrimination, are fully respected during the deposition.

48 ICN, Guidance on Investigative Process, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.

49 *See* ICN Guidance 6.2; Advisory Panel Report at 24. See also, Antitrust Section Best Practices, *supra* n. 35, at 4-10.

50 In fact, to the extent that deposition testimony will be used as evidence, to comport with due process, the testimony should be recorded and/or transcribed to ensure accuracy in its use.

(15) Overall verification of the system as a whole

The final section of the Report Summary rejects a system to establish the upper limit of surcharges based on sales on profit and loss statements "because the legal nature of the current surcharge system shall be maintained, and the level of surcharges shall still be based on the restrainedly estimated amount corresponding to unjust gains and shall not exceed the increased levels prescribed by other laws and regulations."[51] To the extent that the level of surcharges are effectively subject to maximum limits based upon the current methods of calculation, the Sections agree that there may be little need to establish a specific method to establish maximum surcharges.

The Report Summary also notes that the scope of decision-making "by the specialized knowledge of the JFTC shall be confined to the extent necessary, and its transparency/foreseeability shall be secured by formulating and publishing policies and guidelines."[52] The Sections commend the Study Group's support of guidelines, and recommend that such guidelines be clear.[53]

The Report Summary notes that while taking additional factors into consideration in assessing surcharges may add some costs to the system, simplifying the calculation by focusing on volume of sales should decrease costs. In addition, if enterprises try harder to cooperate in investigations than under the current system due to aggravating or mitigating surcharges according to degree of cooperation, swift and efficient operation of the system would not be hindered. The Sections note, however, that the swift, efficient, and fair operation of the system would be enhanced, not hindered, if there were a greater recognition of the due process rights of the entities under investigation, including the attorney-client privilege. When the system provides incentives for entities to cooperate, it also provides incentives for their attorneys to cooperate. These attorneys are in the best position to ensure that the JFTC receives full cooperation. Moreover, in instances in which the JFTC believes an attorney may be hindering the entity's full cooperation, the discretion provided to the JFTC will allow it to eliminate that hindrance. The international enforcement community's widespread acceptance of the participation of attorneys in investigations on behalf of investigated entities and of the attorney-client privilege shows that, while in a specific individual case an enforcement agency may feel attorneys acted as a hindrance, overall the work of defense attorneys has enhanced the efficiency and accuracy of the fact-finding process. Moreover, respect for due process increases respect for the competition agency and makes potential cooperators more comfortable that they will be treated fairly if they choose to cooperate.

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51 Report Summary, p. 10.

52 Report Summary, p. 11.

53 *See above*, pp. 3, 6-7, 8; 2016 Comments p. 11.

Appendices

Joint Comments of the ABA Sections of Antitrust Law and International Law on the Summary of Issues Concerning the Modality of the Administrative Surcharge System of the Study Group on the Antimonopoly Act, August 31, 2016

Joint Comments of the ABA Sections of Antitrust Law and International Law on Attorney-Client Privilege in Response to the Public Consultation Issued by the Cabinet Office of the Government of Japan, July 10, 2014

Abbott B. Lipsky, Jr. and Randolph Tritell, "Best Practices for Antitrust Procedure: The Section of Antitrust Law Offers Its Model," Antitrust Source (December 2015)

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JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW TO THE JAPAN FAIR TRADE COMMISSION ON THE SUMMARY OF ISSUES CONCERNING THE MODALITY OF THE ADMINISTRATIVE SURCHARGE SYSTEM OF THE STUDY GROUP ON THE ANTIMONOPOLY ACT

August 31, 2016

The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The American Bar Association Sections of Antitrust Law ("SAL") and International Law (together the "Sections") respectfully submit these comments (the "Comments") on the "Summary of Issues Concerning the Modality of the Administrative Surcharge System" (the "Summary of Issues"), which were published for comment by The Study Group on the Antimonopoly Act ("Study Group") convened by the Japan Fair Trade Commission ("JFTC").[1] The Sections offer these Comments in the hope that they will assist in improving Japan's administrative surcharge system under its Antimonopoly Act ("AMA"). The Comments reflect the expertise and experience of the Sections' members with antitrust laws around the world and with the practical implications of those laws. In particular, the Sections' members are familiar with issues regarding financial remedies related to antitrust law violations. The Sections are available to provide additional comments, or to participate in consultations with the Study Group and/or the JFTC, as the Study Group and/or the JFTC deems appropriate.

[1] The Summary of Issues was published for public consultation on July 13, 2016, at http://www.jftc.go.jp/en/pressreleases/yearly-2016/July/160713_2.html.

Executive Summary and General Comments

The Sections have previously submitted comments on prospective amendments to the AMA,[2] on the draft leniency rules of immunity from or reduction of surcharges,[3] and on the Report of the Study Group on the Antimonopoly Act.[4] In these Comments, the Sections respectfully refer to these earlier submissions and incorporate them by reference. In addition, as the Sections understand that the Summary of Issues is an early phase of a reconsideration of the administrative surcharge system under the AMA and in the interests of time, these Comments offer their views generally with respect to five topics raised in the Summary of Issues, instead of responding to each specific question presented in the Summary of Issues.

In particular, the Sections: (1) suggest due process safeguards that they believe should be incorporated into any surcharge system; (2) discuss the general principles that they believe should apply to surcharges for antitrust violations; (3) suggest the different approaches that are appropriate for different types of antitrust violations; (4) discuss the interplay between leniency and surcharges; and (5) describe some aspects of the United States experience and approach to leniency and surcharges that may be helpful to the JFTC and the Study Group as they continue their re-examination of the administrative surcharge system. Specifically, the Sections suggest that:

(1) Due process promotes the impartiality, efficiency, and accuracy of antitrust decisions to help achieve competition goals. The Sections respectfully urge the Study Group to provide procedural safeguards while promoting effective enforcement. The Sections respectfully refer the Study Group to SAL's best practices for antitrust procedure ("SAL's Best Practices")[5] and the International Competition Network's Guidance on Investigative Process ("ICN Guidance"),[6] and respectfully suggest that any refinements in Japan's AMA enforcement system ensure procedural safeguards for parties subject to the JFTC's antitrust investigations by incorporating the best practices that have widely been accepted by competition law enforcement regimes. The Sections reiterate their position that the attorney-client privilege as well as the right of counsel at agency interviews should be a fundamental right of defense by the parties under investigation by the JFTC. The Sections respectfully urge

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[2] Comments of the American Bar Association Section of Antitrust Law and the Section of International Law on the Prospective Amendments to Japan's Antimonopoly Act, Mar. 2008, ("Sections' 2008 Comments") *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_japan.authcheckdam.pdf.

[3] Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice on the Japan Fair Trade Commission's Draft Rules on Reporting and Submission of Materials Regarding Immunity from or Reduction of Surcharges Implementing the Amended Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, Aug. 2, 2005, *available at* http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/commentsJFTC.pdf.

[4] Joint Comments of the American Bar Association's Section of Antitrust Law, Section of Intellectual Property Law and Section of International Law and Practice on the Report of the Study Group on the Antimonopoly Act of Japan, Jan. 30, 2004, *available at* http://www.abanet.org/antitrust/at-comments/2004/02-04/abajftcessentialfacilitiesfinal.pdf.

[5] Abbott B. Lipsky, Jr. and Randolph Tritell, "Best Practices for Antitrust Procedure: The Section of Antitrust Law Offers Its Model," Antitrust Source (December 2015) ("Lipsky & Tritell") at 4-10; available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec15_lipsky_tritell_12_11f.authcheckdam.pdf.

[6] ICN, Guidance on Investigative Process, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.

that parties be provided the opportunity to review and receive copies of all of the evidence in an investigation, including exculpatory evidence.

(2) Monetary sanctions ("administrative surcharges" and "criminal fines" in Japan, "fines" in the United States) for competition law violations should both punish the illegal conduct and deter future violations. However, while the guiding principle for surcharges should be deterrence against harm to competition, grounded in economic methodology and not on methods with little direct connection to harm to competition, methods based on proxies for competitive harm may be useful in cartel enforcement.

(3) The Sections urge that any refinements in the administrative surcharge system expressly provide that the JFTC should impose surcharges only for cartel violations of the AMA. The surcharge system should clearly distinguish between hard-core cartel infringements and all other types of competition law infringements, given the range of offenses covered by the AMA, from, *inter alia,* cartels to vertical restraints to abuse of superior bargaining position. In some cases, surcharges may be inappropriate entirely, such as in the cases of abuse of superior bargaining position, and other remedies, such as injunctive relief, may be more appropriate.

(4) The Sections support revising Japan's approach to AMA enforcement, to give the JFTC the authority to adjust surcharges based on the degree of cooperation provided in an investigation, to decide on companies' eligibility for immunity or reduction of surcharge, and to determine the rates of reduction of surcharge. Giving the JFTC discretionary authority to reward cooperation in AMA investigations on a case-by-case basis will allow it to complete investigations more expeditiously and allow companies to put investigations behind them more quickly and efficiently than under Japan's current system. In the case of cartels, the interplay of leniency and surcharges should be such that there is no double counting of sales on which fines or surcharges are based and/or double "discounts" in granting leniency from fines and discounts in surcharges. The optimal course may be first to develop an approach to determining the appropriate base penalty as the surcharge, and then to establish the principles of leniency discounts off that base surcharge. The Sections recommend that clear guidelines be established regarding what levels of cooperation will justify surcharge reductions. The system should allow the JFTC to use its discretion to give discounts within prescribed ranges.

(5) The Sections respectfully share some of the experience in the U.S. in the calculation of fines on cartels that may be helpful, and, in the Appendix to these Comments, provide a detailed description of the U.S. cartel enforcement and fine regime. The United States sets fine levels based on volumes of "affected commerce." Basing surcharges on the sales that a cartel affected furthers the important goals of proportionality and effective deterrence in setting optimal sanctions. Methodologies that calculate surcharges based on factors that are unrelated to anticompetitive conduct are less likely to achieve proportionality and, therefore, may result in under- or over-deterrence.

I. Due Process

Accurate, efficient, and impartial procedures enhance enforcement efforts. For example, allowing parties to fully present their views on the facts and evidence of a case, and on how the law applies to them, will result in better informed agency decisions and will confer legitimacy on the agency's decisions. These procedural safeguard will not undermine "the fact-finding ability" of the agency, but enhance it by enabling the agency to consider – and accept or reject – the viewpoints that the parties present.

Thus, competition law regimes worldwide have converged over the last several decades on best practices on procedural aspects of competition law. The Sections respectfully refer the

Study Group to SAL's Best Practices and the ICN Guidance. The ICN Guidance focuses on procedures in the investigation stage, while SAL's Best Practices cover all stages of an antitrust case: investigation, asserting contentions of infringement, assessing contentions of infringement, first-instance decision and review. SAL's Best Practices are designed to be applied in a wide variety of systems and jurisdictions – adversarial or inquisitorial, common-law or civil-law, judicial or administrative.[7] The Sections respectfully suggest that any refinements in Japan's AMA enforcement system ensure procedural safeguards for any party subject to the JFTC's antitrust investigations, by incorporating the best practices that have widely been accepted by competition law enforcement regimes, namely SAL's Best Practices and the ICN Guidance.

Key elements of SAL's Best Practices include: (i) disclosure of all evidence and clear explanation of legal and economic theories to a target of the agency's investigation;[8] (ii) opportunity for a party and its counsel to present its views on facts and theories as well as its evidence[9] and to challenge the agency's evidence and arguments;[10] (iii) basing the agency's decision on a well-considered assessment, including a balanced evaluation of both inculpatory and exculpatory evidence;[11] and (iv) an effective system to prevent unnecessary delay at any stage in the proceedings.[12]

Giving the JFTC discretion in setting surcharge levels will be a significant change to Japan's system of AMA enforcement. Such additional discretion will come with added responsibility. Due process rights and procedures that promote the impartiality, efficiency, and accuracy of antitrust decisions help achieve competition goals. The success of any program that gives the JFTC the power to determine surcharge levels will depend on the JFTC's ability to exercise its judgment in a way that is consistent, predictable, and transparent. The Study Group evidently recognizes this important fact and in its Summary of Issues seeks comments on due process rights under a new surcharge system.[13] The Sections respectfully suggest that effective enforcement can be achieved only if adequate procedural safeguards are provided. Beyond the attorney-client privilege and the right of counsel to appear at the agency's interview that the Study Group highlighted, the Sections urge the Study Group to consider providing investigation targets with the opportunity to review and receive copies of all of the evidence in an investigation, including exculpatory evidence, so that there is a real and effective opportunity for a party to fully pursue its defense and for all of the facts to be considered. Furthermore, as a discretionary surcharge system creates substantial incentives for parties to cooperate with investigations; due process protections for all parties will allow the JFTC to protect against potentially overzealous cooperation and to benefit fully from the incentives to cooperate. Providing discretion on surcharges and procedural fairness will ultimately help the

[7] Lipsky & Tritell at 3.

[8] SAL's Best Practices, Part I.E, I.G, II.A, IV.B.

[9] *Id*. Part I.G, II.A, III.D.

[10] *Id*. Part III.E.

[11] *Id*. Part I.D, II.A.

[12] *Id*. Part VI. C.

[13] Summary of Issues Part 3.5.

JFTC fulfill its mission, as well as the validity of the JFTC's investigations and decisions internationally.

A. Attorney-Client Privilege and the Right of Counsel to Attend Witness Interviews

The Summary of Issues also poses questions on whether "a consistency with the system in other foreign counties" should be achieved on issues such as attorney-client privilege and right of counsel at the agency's interview. The Sections reiterate their position that the attorney-client privilege as well as the right of counsel at agency interviews should be ensured as a fundamental right of defense by the parties under investigation by the JFTC. Recognizing the attorney-client privilege would contribute to the rule of law in Japan's antitrust enforcement system by (i) fostering the attorney-client relationship, (ii) encouraging client candor, (iii) fostering voluntary legal compliance, (iv) promoting efficiency in the legal system, and (v) enhancing the right to effective assistance of counsel.[14]

The adoption of the attorney-client privilege in AMA enforcement was rejected in 2014 because the Advisory Panel on Administrative Investigation Procedures under the AMA ("Advisory Panel") "could not dispel concerns that the fact-finding ability of the JFTC would be impeded as a result of introducing such privilege" especially under a system without any incentive for a party to cooperate voluntarily with the JFTC's investigation.[15] However, adoption of a discretionary surcharge system that creates incentives for parties to cooperate with the JFTC could fundamentally alter the dynamic between government officials and counsel representing investigation targets. The Sections respectfully recommend that the attorney-client privilege be recognized in all JFTC antitrust investigations, and note that, with a discretionary surcharge system, the JFTC should no longer have any concerns about inadequate incentives for full and voluntary cooperation.

Regarding the right of counsel to be present at the agency's interviews, the ICN Guidance provides that "[p]arties should be allowed to be represented by counsel of their choosing during the investigation."[16] In 2014, the Advisory Panel noted that "it is appropriate to continue discussions on the necessity and advisability of introducing [the right of counsel at interviews] when considering measures which will not impede the effectiveness of the fact-finding ability of the JFTC."[17] As a discretionary surcharge system would create additional incentives for parties to cooperate and serve as a disincentive for the parties and their counsel to impede the JFTC's fact-finding, the Sections respectfully urge that parties' counsel be permitted to attend the JFTC's interviews of witnesses, especially in the event of the adoption of such a system.

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[14] See, Joint Comments of the American Bar Association's Sections of International Law and Antitrust Law on Attorney-Client Privilege in response to the Public Consultation issued by the Cabinet Office of the Government of Japan" available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20140711.authcheckdam.pdf.

[15] See, "Report Issued by the Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act" ("Advisory Panel Report") at 17; available at http://www8.cao.go.jp/chosei/dokkin/finalreport/body-english.pdf.

[16] ICN Guidance 6.2.

[17] Advisory Panel Report at 24.

II. General Principles on the Use of Surcharges in Competition Law Cases

Monetary sanctions for competition law violations seek both to punish the illegal conduct and to deter future violations. Surcharges, or fines, promote deterrence by making violations less profitable. Firms should believe that the expected penalty from an illegal course of conduct is greater than the expected gain. But effective deterrence must be tempered by an equally important goal: ensuring proportionality. Surcharges should be proportional to the violation or the harm caused by the violation. They should also avoid deterring procompetitive and competitively neutral conduct and under-deterring harmful conduct.[18]

In general, any enforcement system should seek to set penalties at levels sufficient to induce offenders to internalize the full social cost of their illegal conduct[19] while minimizing the total social costs associated with implementing the policy.[20] These costs include the costs of false positives and false negatives, and the costs associated with administering the system.[21] To achieve these goals, optimal sanction levels should be set so that offenders take into full account the social costs of their misconduct.[22] In order to achieve this, the optimal sanctions should take into account both (1) the full level of those social costs, and (2) the probability that the offender's misconduct will be detected and punished.[23] This means that, for optimal deterrence of the conduct, the penalty must be sufficient to destroy the benefit to the offender of the misconduct by rendering the expected value of the misconduct at or below zero, which requires taking into full account the likelihood that an illegal course of conduct will be uncovered and successfully prosecuted.[24]

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[18] *See* Organisation for Economic Cooperation and Development, Remedies and Sanctions in Abuse of Dominance Cases (2006) ("OECD Report") at 22-23, *available at* http://www.oecd.org/competition/abuse/38623413.pdf.

[19] *See*, Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169 (1968) ("Becker"); see also William M. Landes, Optimal Sanctions for Antitrust Violations, 50 U. CHI. L. REV. 652 (1983) ("Landes"); Douglas H. Ginsburg & Joshua D. Wright, Antitrust Sanctions, 6 COMPETITION POL'Y INT'L 3, 3 (2010) ("Ginsburg & Wright"); Bruce H. Kobayashi, Antitrust, Agency, and Amnesty: An Economic Analysis of the Antitrust Laws Against Corporations, 69 GEO. WASH. L. REV. 715 (2001).

[20] *See* Frank H. Easterbrook, The Limits of Antitrust, 63 TEX. L. REV. 1, 15 (1984); see also James C. Cooper et al., Vertical Antitrust Policy as a Problem of Inference, 23 INT'L J. INDUS. ORG. 639, 658 (2005); Joshua D. Wright, Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust, 78 ANTITRUST L.J 241 (2012).

[21] Antitrust scholars have used this theoretic framework to determine which antitrust rules best promote competition and protect consumer welfare. *See, e.g.*, C. Frederick Beckner, III & Steven C. Salop, Decision Theory and Antitrust Rules, 67 ANTITRUST L.J. 41 (1999); James C. Cooper et al., *supra* note 20; David S. Evans & A. Jorge Padilla, Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach, 72 U. CHI L. REV. 73, 98 (2005); Keith N. Hylton & Michael Salinger, Tying Law and Policy: A Decision-Theoretic Approach, 69 ANTITRUST L.J. 469 (2001); Geoffrey A. Manne & Joshua D. Wright, Innovation and the Limits of Antitrust, 6 J. COMPETITION L. & ECON. 153 (2010).

[22] See Becker; Landes; George J. Stigler, "The Optimum Enforcement of Laws", 78 *Journal of Political Economy* 526 (1970); and John M. Connor and Robert H. Lande, "Cartel Overcharges and Optimal Cartel Fines" in 3 Issues in Competition Law and Policy (ABA Section of Antitrust Law 2008),

[23] This punishment may take the form of criminal fines and administrative surcharges, as well as civil damages.

[24] See, for instance, Ginsburg & Wright.

Some competition law violations are easier to detect than others. For example, potentially anticompetitive conduct by dominant firms that is overt is more readily discovered than cartel conduct. Because cartels are difficult to uncover and some cartels are not prosecuted, to achieve adequate deterrence, sanctions against them must be greater than the expected gains in order to take into account the chances of not getting caught, and thereby seek to ensure that the cartel conduct does not have a likely profitable outcome.

In an imperfect world, market participants should have the risk of a penalty calibrated to internalize the social cost of the conduct, and, in the case of cartels, so that the gains from engaging in the cartel are less than or equal to the expected penalty at the time the firm decides to engage in the cartel. The expected penalty equals the total penalty multiplied by the probability of detection and punishment. The probability of punishment includes the potential for both private and public enforcement actions. If all illegal conduct is likely to be detected by private persons with standing to sue and/or a public enforcement body, and penalized at a level exactly equal to its social cost, then any additional penalties are unnecessary to deter violations. However, if the likelihood of detection is less than 100%, then penalties that exceed the social cost of the violation may be warranted to effectively deter future violations.[25]

In practice, calculating optimal sanction levels is extremely difficult. This is especially the case for conduct that may or may not be anticompetitive depending on the particular circumstances.[26] In such cases, care must be taken not to impose penalties at levels that may deter future conduct that may in fact be procompetitive or competitively neutral, or conduct that, at the time it occurred, was not clearly harmful or illegal.

The assessment of the Organization for Economic Cooperation and Development ("OECD") of the difficulty of establishing monetary sanctions in abuse of dominance cases is instructive:

> Regardless of the method used, optimisation is unlikely to be possible in practice because the variables involved are too difficult to observe or quantify. That may be especially problematic in abuse of dominance cases because even the threshold task of determining whether unilateral conduct is anti-competitive or pro-competitive can be very difficult. Trying to quantify the forces at work adds another substantial layer of complexity.[27]

These difficulties of quantifying competitive harm and setting optimal sanctions arise in all types of competition law violations – abuse of dominance cases, all other unfair competition cases, and even hard-core cartel cases. Therefore, while the guiding principle in surcharges should be deterrence against harm to competition, calculated based on economic analysis and

[25] Comment of the Global Antitrust Institute, George Mason University School of Law, on the Japan Fair Trade Commission's Consultation on the Administrative Surcharge System, available at http://gai.gmu.edu/wp-content/uploads/2016/07/GAI_Comment-on-the-Administrative-Surcharge-System_Summary-of-Issues_8-6-16_FINAL-1.pdf.

[26] For example, economists have long understood that unilateral conduct and vertical restraints are frequently procompetitive. *See, e.g.*, James C. Cooper et al., *supra* note 20; Francine Lafontaine & Margaret Slade, Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy, in HANDBOOK OF ANTITRUST ECONOMICS 391, 409 (Paolo Buccirossi ed., 2008); Daniel O'Brien, The Antitrust Treatment of Vertical Restraint: Beyond the Possibility Theorems, in THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 76 (2008).

[27] OECD Report at 41.

not on methods with little direct connection to harm to competition, methods based on proxies for competitive harm may be useful.

III. Appropriate Use of Surcharges

In the United States, criminal fines are imposed only in cases involving hard-core cartels. The United States Sentencing Guidelines ("Sentencing Guidelines"), which provide the framework for calculating fines in U.S. federal courts, explain why:

> [T]here is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm. There is no consensus, however, about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated.
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> The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal per se, i.e., without any inquiry in individual cases as to their actual competitive effect.[28]

The Sentencing Guidelines' description of which competition law violations are prosecuted criminally is consistent with the definition of hard-core cartel conduct adopted by the OECD and the ICN.[29]

Hard-core cartel violations are fundamentally different from all other types of infringements, including unilateral conduct and unfair trade practice violations. As the OECD has recognized: "For certain violations, such as cartels, which are categorically considered to be harmful and without any possible offsetting benefits, over-deterrence is not much of a concern."[30] Such is not the case with violations other than cartel offenses. Unlike cartel conduct, the competitive effects associated with most other types of potential infringements are often difficult to analyze. They cause competitive harm only in limited circumstances and often can be benign, pro-competitive, or have offsetting efficiency benefits. Where such conduct is benign or pro-competitive, the conduct can create social and economic benefits. If penalties for such conduct are set above the optimal level, they can lead to chilling of such benign or pro-competitive conduct, in turn leading to substantial social costs. Over-enforcement is therefore a significant concern with regards to non-cartel potential infringements. Conversely, cartels are generally recognized as conduct that effectively never creates social benefits and effectively always creates net social losses. Over-enforcement is therefore a lesser concern in relation to

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[28] Sentencing Guidelines, §2R1.1 (Background) (2015), *available at* http://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-2-l-x#NaN.

[29] See OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, OECD Document No. C(98)35/Final (May 14, 1998) ("OECD Recommendation"), at 2(a), available at: http://www.oecd.org/daf/competition/2350130.pdf; ICN, Building Blocks for Effective Anti-Cartel Regimes, Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties, (June 2005) ("ICN Defining Hard Core Cartel Conduct") at 12, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf.

[30] *See* OECD Report at 23.

cartels compared to non-cartel potential infringements.[31] Moreover, cartels are clandestine by their very nature and are difficult to detect, as opposed to most other types of potential infringements, which may be overt (i.e. abuse of dominance) and therefore, somewhat easier to detect. In the U.S., disgorgement and private treble damages remedies, rather than criminal penalties, serve to remedy and deter non-hard-core anticompetitive conduct.

The Sections respectfully suggest that, in light of these factors, the Study Group consider whether the surcharge adopted for hard-core cartels is appropriate for other infringements of the AMA. The Sections continue to believe that remedial measures aimed at addressing private monopolization and unfair trade practices should be carefully crafted to avoid potentially chilling competitively neutral or even procompetitive conduct.[32] For AMA violations other than hard-core cartel offenses, the Sections believe that surcharges should be imposed with extreme caution, if at all. The Sections also recommend that to the extent any surcharges are imposed on non-cartel violations, such surcharges should be based on a thorough analysis of the violation's competitive effects and a quantification of the actual competitive harm that the violation has caused. The Sections realize that it will be challenging for the JFTC to quantify actual overcharges before imposing surcharges, but believe that this approach is the most effective way to prevent the surcharge system from chilling benign or procompetitive conduct.

Therefore, in response to the question presented in the Summary of Issues of whether the proposed surcharge system should take into account differences in types of infringement when calculating the amount of surcharge,[33] the Sections urge that any refinements in the administrative surcharge system expressly provide that the JFTC should impose surcharges generally only for cartel violations of the AMA.[34] The Sections believe that the surcharge system should clearly distinguish between hard-core cartel infringements and all other types of competition law infringements, given the range of offenses covered by the AMA, from cartels to vertical restraints to abuse of superior bargaining position. In some cases, surcharges may be inappropriate entirely, such as in the cases of abuse of superior bargaining position and most other unfair trade practices, and other remedies, such as injunctive relief, may be more appropriate. One size (surcharges) does not fit all.

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[31] See, e.g., Gregory J. Werden, "Sanctioning Cartel Activity: Let the Punishment Fit the Crime", *European Competition Law Journal* (March 2009).

[32] In the Sections' 2008 Comments, the Sections described the U.S. enforcement system's approach to potential unilateral conduct offenses, and recommended that the JFTC "consider whether [] remedying private monopolization through the imposition of cease-and-desist orders may already be effective in deterring the proscribed conduct." The Sections also suggested that if the JFTC decides to introduce surcharges to cover unilateral conduct, it should consider a system "to avoid unduly discouraging aggressive but beneficial competition in the marketplace." Sections' 2008 Comments at 2-3. Regarding "abuse of superior bargaining position," the Sections commented that "the abuse of superior bargaining position can be very difficult to identify correctly" and "adding the risk of surcharges … may unintentionally deter procompetitive transactions that would have ultimately benefited consumers." Id. at 5.

[33] *See, e.g.*, Summary of Issues Part 3.2 "Differences by types of infringement."

[34] There may be serious non-cartel violations of the AMA for which a penalty equal to the improper gains from the violation may be appropriate, but the Sections believe such situations will be rare.

IV. Leniency and Surcharges

The Summary of Issues raises questions about the factors that should be considered in a system in which a leniency program for cartel enforcement coexists with a discretionary surcharge program. It asks about the advisability of giving the JFTC the authority to adjust surcharges based on the degree of cooperation provided in an investigation, to decide on companies' eligibility for immunity or reduction of surcharge, and to determine the rates of reduction of surcharge.[35] The Sections support this fundamental adjustment to Japan's approach to AMA enforcement. The interplay of leniency in cartel enforcement and surcharges should be such that there is no double counting of sales on which fines or surcharges are based and/or double "discounts" in granting leniency from fines and discounts in surcharges. The optimal course may be first to develop an approach to determining the appropriate base penalty as the surcharge, and then to establish the principles of discounts off that base surcharge.

Japan's leniency program differs from the systems in the United States,[36] the European Union, and other jurisdictions by not giving the JFTC the discretion to adjust surcharge discounts based on the quality of a company's cooperation.[37] The Sections understand that the current compulsory and uniform surcharge system in Japan prohibits the JFTC from exercising any discretion in imposing surcharges. The JFTC has no power, other than through its leniency program that applies only to cartel conduct, to reduce the penalties levied on companies that cooperate with government investigators. Thus, because companies have no incentive to cooperate with the JFTC in investigations outside of the leniency program, i.e. investigations of conduct other than cartel conduct, they normally do not. Typically, the relationship between the JFTC and its target companies that do not qualify for reductions of surcharges through the leniency program is antagonistic. Providing the JFTC with the authority to adjust surcharges in those circumstances would change this dynamic. It would create a system in which companies inclined to cooperate with government officials might do so,[38] knowing that their efforts could be rewarded in the form of reduced penalties and quicker resolution of any investigation. Giving the JFTC discretionary authority to reward cooperation in cartel investigations on a case-by-case basis will allow the JFTC to complete its investigations more expeditiously and allow companies to put investigations behind them more quickly and efficiently than under Japan's current system.

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[35] *See* Summary of Issues Part 3.1(4).

[36] The U.S. leniency policy, which grants full leniency from fines, applies only to the "first-in". In contrast, in the EU, leniency is available to many applicants and applies in tiers. However, the U.S. plea bargaining system achieves outcomes similar to the EU tiered system. An enterprise that enters into a plea agreement can expect a reduction in the penalty predicated on the value of its assistance, which is usually a function of the timing. Therefore, the Comments discuss "leniency" in the U.S. from the practical perspective of all companies that receive fine reductions in return for cooperation, not just the formal first-in leniency applicant.

[37] The Sections understand that in Japan the initial applicant for leniency in a matter before the JFTC has initiated an investigation receives immunity (a 100% discount), the second a 50% discount, and the third, fourth, and fifth a 30% discount. After the JFTC has initiated an investigation, the first three applicants receive a 30% discount. See JFTC, ICN Anti-cartel Enforcement Template, Section G, available at http://www.jftc.go.jp/en/policy_enforcement/cartels_bidriggings/anti_cartel.html.

[38] In fact, the Trans Pacific Partnership requires the JFTC to adopt commitments procedures for non- cartel conduct that would provide incentives for companies under investigation to cooperate with the investigation and offer remedies to avoid findings of a violation.

The benefits of giving enforcement agencies the discretion to incentivize and reward cooperation are widely recognized.[39] Most enforcement authorities have adopted programs that create incentives to encourage companies to report competition law violations and provide cooperation. These incentives take the form of graduated discounts to the monetary sanctions imposed. Typically, the first company to meet the jurisdictions' program requirements (the "leniency" applicant in the United States, the "immunity" recipient in the European Union) receives a 100% discount in its fine. Companies that cooperate subsequently receive stepped reductions in their monetary sanctions. These tiers vary from country to country. For example, in the EU, the first company to qualify for a discount after the immunity recipient (effectively the second company to cooperate) is granted a 30 to 50% reduction, the second 20 to 30%, and subsequent companies up to 20%.[40] The United States is less transparent about the cooperation discounts it gives because they come in the context of negotiated plea agreements with individual defendants that must be approved by the courts. Nevertheless, the Antitrust Division of the U.S. Department of Justice ("DOJ") has historically given a 30 to 35% discount off the bottom of the Sentencing Guidelines fine range to the "second-in" company (after the leniency applicant) to agree to plead guilty and cooperate. Companies that plead guilty and cooperate later in an investigation receive successively smaller fine discounts from the DOJ.[41]

The Sections recommend that clear guidelines be established regarding what levels of cooperation will justify surcharge reductions. Two criteria that are of particular importance in assessing cooperation are timeliness and the value of a party's cooperation to the investigation. Timeliness is a straightforward criterion: early cooperation is more valuable and should be rewarded with greater discounts than comparable but later cooperation.

The Sections take no position on the advisability of specific discount amounts; different enforcement regimes appear to have successfully implemented programs with different levels. But the Sections do recommend that the Study Group consider a system that would allow the JFTC to use its discretion to give discounts within ranges. For example, the first company to cooperate after the immunity recipient could be entitled to receive a discount of 40 to 50% at the JFTC's discretion. And subsequent companies could be entitled to smaller discounts within specified ranges. The JFTC would decide the amount within the range each company would receive.

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[39] *See, e.g.*, OECD, Policy Roundtables - Plea Bargaining (2006) at 236, *available at* https://www.oecd.org/competition/cartels/40080239.pdf (Roundtable Chair concludes discussion "by noting the unanimous opinion that settlements could increase efficiency of enforcement efforts in terms of resolving matters more quickly and of using cooperation to build cases."); ICN, Cartel Settlements (Apr. 2008) ("ICN Cartel Settlements") at 23, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf ("The amount of the substantial assistance reduction in the fine or period of incarceration to which the government will agree to recommend is usually tied to the timeliness and quality of the cooperation that the settling party is able and willing to provide. This not only provides an incentive to settle, but also helps ensure the quality of cooperation the settling party will provide. In addition, cooperation requirements may also provide a response to the public perception or implication at any trial that the settling party is receiving a 'free ride.'").

[40] *See* Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006 O.J. E.U. C 298/11, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208(04)&from=EN.

[41] *See* Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., Presented at American Bar Association Section of Antitrust Law Spring Meeting, Measuring the Value of Second-in Cooperation in Corporate Plea Negotiations (March 2006), *available at* www.justice.gov/atr/public/speeches/215514.html.

Assessing the value of cooperation to an investigation requires more judgment than just ranking companies by when they began cooperating; in exercising that judgment enforcement authorities have developed similar criteria when assessing quality. Cooperation typically includes production of all relevant documentary evidence, production of corporate employees for interviews and legal proceedings, and use of "best efforts" to secure the cooperation of former corporate employees covered under the settlement, including making employees available at the corporation's expense for interviews and testimony. Cooperation also should be candid, complete, and truthful. Also, it should advance the investigation. The European Commission requires evidence that provides "significant added value" to the investigation, that "strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel."

Finally, cooperation should continue throughout the life of the investigation.[42] As the ICN has noted: "in order to be most effective, the cooperation requirements contained in a settlement should be ongoing obligations and the government should be able to void the settlement for failure to comply with the cooperation obligations, even after the sentence or penalty is imposed."[43] The United States requires that companies receiving fine discounts for cooperation in cartel cases must cooperate throughout the pendency of the investigation.

The Sections suggest that it is worthwhile for the Study Group to consider whether the JFTC should be empowered to reward exceptional cooperation with surcharge discounts even greater than the usual range of reductions. Under such an approach, if the first company to cooperate after an immunity recipient was normally entitled to a discount of 50%, the JFTC could be empowered to grant an additional discount of up to 10% (as high as 60%) in response to a party's exceptional qualitative cooperation. This system could create additional incentives for parties to proactively provide extraordinary cooperation. If the Study Group considers introducing this system, the Sections recommend that guidelines clearly identify what constitutes "exceptional cooperation." For example, it could include cases in which a leniency applicant produced evidence of cartel conduct that was unknown to the JFTC or evidence that expanded the duration or geographic scope of a cartel under investigation. It is especially important to provide clear guidance on the circumstances in which greater-than-usual discounts are granted on surcharges.

Another criterion that might be the basis for determining the level of surcharge reduction, particularly in cartel cases, could be whether the company has in place a credible and effective compliance program. A compliance program should be considered credible and effective when the company can demonstrate that it was reasonably designed, implemented, and enforced.

Further, the Study Group asks in the Summary of Issues if there is a need to enable effective penalties for obstruction of investigations, beyond existing penalties.[44] The Sections support empowering the JFTC to sanction obstructive conduct by targets of investigations beyond existing penalties only if there are clear guidelines as to the circumstances in which an additional surcharge may be imposed, and if judicial review is available. Obstruction should

[42] The Study Group also asks whether applicants in the leniency program should be required to cooperate throughout the investigation. *See* Summary of Issues Part 3.1(4)C(D).

[43] *See* ICN Cartel Settlements at 23.

[44] *See* Summary of Issues Part 4(4).

include affirmative steps to impede an investigation – for example, destroying, hiding, or withholding documentary evidence or attempting to induce witnesses to provide false testimony.

V. Appropriate Calculation of Surcharges

As to the appropriate calculation of surcharges on cartels, the Sections respectfully share some of the experience in the U.S. that may be helpful.[45] The Sentencing Guidelines provide that virtually all fines in cartel cases are set using the following methodology: the calculation starts with a "base fine" of 20% of the "the volume of commerce attributable to an individual participant in a conspiracy . . . in goods or services that were affected by the violation."[46] This figure is then adjusted by a culpability score that is based on such factors as the size of the organization within which the violation occurred, whether high-level personnel within that organization participated in, condoned, or were willfully ignorant of the offense, whether the company has any prior history of misconduct, and whether the company impeded or obstructed the investigation.[47] The final culpability score translates into minimum and maximum multipliers which are applied to the base fine.[48] For example, if the base fine is $10 million and the culpability score is 6, the minimum and maximum multipliers are 1.2 and 2.4, and the minimum and maximum fine range is $12 million ($10 million x 1.2) to $24 million ($10 million x 2.4).

The Summary of Issues includes the question of whether changes are required in Japan's system of basing surcharges on sales of goods and services subject to the illegal restraint.[49] The United States sets fine levels based on volumes of "affected commerce." United States courts have not agreed on the precise meaning of this term,[50] and SAL recently requested that the United States Sentencing Commission ("Sentencing Commission") consider the question of whether a more precise description for "affected commerce" is necessary, and suggested that "affected commerce" should generally exclude non-U.S. commerce.[51] In the

[45] In the Appendix to these Comments, the Sections describe in greater detail the U.S. cartel enforcement and fine regime. Several aspects of the U.S. regime may be helpful to the Study Group's further consideration of the appropriate direction for Japan's system, such as "leniency plus", "second-in", ability to pay, and the approaches in the Sentencing Guidelines to factors such as recividism, size of entity, compliance programs, role of senior management, and role of entity.

[46] Sentencing Guidelines at §2R1.1.

[47] *Id.* at §8C2.5, *available at* http://www.ussc.gov/guidelines/2015-guidelines-manual/archive/2013-8c25.

[48] *Id.* at §8C2.6, *available at* http://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8#NaN.

[49] *See* Summary of Issues Part 3.1(1)A.

[50] *Compare* United States v. Hayter Oil Co., 51 F.3d 1265, 1273 (6th Cir. 1995) (permitting a presumption that affected commerce includes all "sales during the period of the conspiracy", without regard to whether individual sales were made at the target price); *with* United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 91 (2d Cir. 1999) (sales "during intervals when the illegal agreement was ineffectual and had no effect or influence on prices" should be excluded); and United States v. Andreas, 216 F.3d 645, 678 (7th Cir. 2000) (sales that were "entirely unaffected" by the illegal agreement should be excluded, but noting that "few if any factors in the world of economics can be held in strict isolation," so "the presumption must be that all sales during the period of the conspiracy have been affected by the illegal agreement.").

[51] *See* SAL, Comments to the United States Sentencing Commission on Proposed Priorities for Amendment Cycle Ending May 1, 2016 (July 27, 2015) ("SAL Sentencing Commission Comments") at 5-6, *available at*

United States, companies under investigation regularly engage in extensive negotiations with enforcement officials about what categories of commerce should, and should not, be included in calculating a base fine.

Notwithstanding the imprecision in the term "affected commerce," the approach of basing surcharges on the sales that a cartel affected furthers the important goals of proportionality and effective deterrence in setting optimal sanctions.[52] By focusing on the economic effects of the unlawful conduct, the surcharge calculation is responsive both to the competitive harms suffered by market participants and the ill-gotten gains retained by the cartelists. Methodologies that calculate surcharges based on factors that are unrelated to cartel activity – for example, general turnover figures – are less likely to achieve proportionality and, therefore, may result in under- or over-deterrence. Likewise, possible adjustments to surcharges based on such factors as the type of business involved[53] or whether the company is a small or medium-sized enterprise[54] are inconsistent with the principle of proportionality and may, in practice, fail to reflect the offending party's culpability. The Sections suggest that the Study Group consider whether such factors are necessary in setting surcharges for cartels.

The Study Group also presents in the Summary of Issues a question about the basis for the surcharge calculation rate.[55] The United States uses a 20 percent proxy in setting cartel fine levels[56] if "calculation of . . . pecuniary gain . . . would unduly complicate or prolong the sentencing process."[57] Proxies do not measure the actual harm that any cartel caused. They constitute a "one size fits all" approach that makes no effort to establish actual cartel overcharges. SAL recently requested that the Sentencing Commission reconsider whether the 20 percent proxy number is appropriate.[58] Nonetheless, the United States has based every fine imposed in a cartel case in the past two decades on the 20 percent proxy in spite of its shortcomings. The DOJ has taken this approach because, in its view, calculating ill-gotten gain in any cartel case would be too difficult, costly, and time consuming to be practical.[59]

The Study Group also asks in the Summary of Issues whether the JFTC should take into account "ability to pay" as a mitigating factor in determining the amount of surcharge.[60]

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http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_sal_20150727.authcheckdam.pdf.

[52] Accordingly, a defendant that has not generated sales in Japan during the relevant period should not be subject to a surcharge in Japan, but will be subject to fines in the jurisdiction(s) where it generated sales of the cartelized product or services.

[53] *See* Summary of Issues Part 3.1(2)B.

[54] *See id.* at Part 3.1(2)C.

[55] *See* id. at Part 3.1(2)A.

[56] The Canadian Competition Bureau also uses a 20 percent proxy for cartel surcharges.

[57] Sentencing Guidelines at §8C2.4(a)(c).

[58] *See* SAL Sentencing Commission Comments at 3-5.

[59] The issue does not arise in non-cartel cases in the U.S., because the U.S. imposes criminal fines only in cases involving hard-core cartels.

[60] *See* Summary of Issues Part 3.1(3).

In cases where an applicant's ability to pay a surcharge is in question and a party claims that a surcharge could threaten its economic viability, the Sections believe the JFTC should critically assess the claim before establishing a surcharge. A company making such a claim should bear the burden of producing detailed evidence of its financial condition and other evidence to establish its claim.[61] But if a party can establish that a surcharge would threaten its viability, the JFTC should have the authority to reduce the surcharge imposed or set a payment schedule that ensures the party will not be driven out of business.[62] It is generally not a procompetitive outcome for a penalty to be so heavy as to put a firm out of business, and thus consideration of true ability to pay is important.

Conclusion

The Sections appreciate the JFTC's consideration of these Comments on the Summary of Issues.

[61] See ICN Defining Hard Core Cartel Conduct at 64 (detailed lists of the types of evidence that should be considered in ability-to-pay analyses).

[62] *Id*. at 63. For example, the DOJ has allowed installment payments in some circumstances, to avoid anticompetitive outcomes of too large fines. Related factors that the JFTC should also have the discretion to consider are the penalties that may be imposed on the party by enforcers in other jurisdictions (especially if those penalties are based upon the same sales that the JFTC would consider in determining a fine or surcharge) and the damages that may be recovered by private parties from the party, with regard to their impact on both the economic viability of the company and the total liability that the party may face.

Appendix

U.S. Cartel Enforcement and Fine Regime

Introduction

The United States cartel enforcement and fine regime incorporates a variety of mechanisms that enable courts and the U.S. Department of Justice (DOJ) to make adjustments and tailor outcomes to particular circumstances, to apply and balance various policy considerations in fashioning an appropriate result in each case. Punishment, deterrence, encouraging self-reporting and cooperation, conserving prosecutorial and judicial resources, preserving competition in the marketplace, and promoting compliance can all be reflected to various degrees in each resolution of a criminal cartel case.

The refinements to the cartel enforcement and fine regime may be divided into three categories: (1) policies implemented unilaterally by the DOJ such as its leniency policy; (2) the calculation of the fine range under the United States Sentencing Guidelines (the "Guidelines"); and (3) determinations of appropriate fines within the Guidelines and departures from the fine range.

I. DOJ Enforcement Policies

The DOJ has adopted several enforcement policies that enable it to advance certain goals as part of its cartel enforcement. These policies are not founded on any specific regulations or laws, but rather fall within the DOJ's prosecutorial discretion. The DOJ has the right not to apply these policies in any particular case, since these policies are not required to be applied by any law. However, as a practical matter, the DOJ consistently applies them so as to provide certainty to parties and practitioners, and to create transparency with respect to enforcement outcomes.

1) Leniency

The DOJ's leniency program is a powerful tool for detecting antitrust cartels and encouraging self-reporting by corporations.[1] In exchange for confessing illegal antitrust activity and cooperating with the DOJ in its investigation, the DOJ Corporate Leniency Policy provides a corporation with the opportunity to receive full immunity under the antitrust laws for its involvement in the reported illegal conduct.[2] If a company applies and successfully receives leniency, then the corporation will avoid criminal convictions, criminal fines, and in certain cases potential prison sentences for its employees. Only one applicant can be granted leniency for a particular antitrust conspiracy, so the program provides significant incentives for a corporation to self-report and to do so as quickly as possible.

In order to receive leniency, the corporation must generally meet certain eligibility requirements, admit to a criminal violation of the antitrust laws, and cooperate fully with the DOJ throughout its investigation of the anticompetitive conduct. The eligibility requirements for a leniency applicant differ depending upon whether the DOJ has already begun investigating the illegal conduct at issue.

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[1] Department of Justice, *Corporate Leniency Policy*, 1 (Aug. 10, 1993) [hereinafter *DOJ Corporate Leniency Policy*], *available at* https://www.justice.gov/atr/file/810281/download.

[2] The DOJ also has a leniency policy for individuals with similar eligibility and cooperation requirements. *See* Department of Justice, *Individual Leniency Policy* (Aug. 10, 1994), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0092.pdf.

If the corporation reports the conduct before the DOJ's investigation has begun, for example, then the DOJ must not have received any information about the anticompetitive conduct from any other source.[3] Additionally, the reporting party must not have been the leader of the conspiracy, must not have coerced another party into participating in the conspiracy, and must have promptly terminated its own involvement in the conspiracy upon discovery.[4] If the DOJ has already learned of a possible conspiracy or began its investigation, then the eligibility requirements are slightly different. The corporation must instead be the first participant in the conspiracy to approach the DOJ and apply for leniency, and the DOJ must not have sufficient evidence to convict the company at the time of reporting.[5] Additionally, the DOJ must find that a leniency grant would not be unfair to others given the illegal conduct, timing of confession, and the reporting party's role in the conduct.[6]

Assuming that a corporation satisfies the eligibility requirements and applies for leniency, the party must also meet several conditions regarding its cooperation and conduct going forward. First, the party must "report[] the wrongdoing with candor and completeness."[7] The party must also cooperate fully and completely with the DOJ throughout the entirety of the investigation. Finally, the party must make restitution to injured parties wherever possible.[8]

2) Amnesty Plus

The DOJ's "Amnesty Plus" program also provides a significant incentive for a company to self-report, even if it is already under investigation. If a corporation is under investigation for illegal conduct and reports its involvement in a separate, unidentified antitrust conspiracy to the DOJ, it can reap substantial benefits.[9] Even if the company was too late to apply for or to obtain leniency in the conspiracy already under investigation, the reporting company may not only receive amnesty for the second conspiracy, but also a significant fine reduction for its involvement in the first.[10] In exchange for this self-reporting, the DOJ will recommend that the sentencing court greatly discount the company's fine for the first conspiracy.

The size of the recommended Amnesty Plus discount depends upon three factors that afford the DOJ with substantial discretion. These factors include: (1) the amount of evidence provided by the company for the leniency-related conspiracy; (2) the potential significance of the violation reported in its leniency application, considering the volume of affected commerce, geographic scope, number of companies involved, etc.; and (3) the likelihood that the DOJ would have discovered this other conspiracy or conduct if the company had not self-reported.[11] The DOJ tends to provide more weight to the first two factors in its consideration of the fine reduction.[12]

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[3] *DOJ Corporate Leniency Policy* at 1.
[4] *Id.* at 2.
[5] *Id.*
[6] *Id.* at 3.
[7] *Id.* at 2-3.
[8] *Id.*
[9] *Id.* at 8-9.
[10] *Id.*
[11] *Id.*
[12] *Id.*

3) Second-In

The first qualifying company to report an offense is eligible for complete immunity, but a company that follows as "second-in" to self-report can also receive substantial benefits.[13] The leniency provided a second-in company depends on a number of factors related to how significantly the cooperation advances the investigation. These factors include the state of the investigation at the time of the cooperation, the nature and extent to which the cooperation advanced the investigation, and whether the cooperation disclosed previously-undetected cartel offenses.

If a qualifying second-in company provides information that increases the volume of commerce[14] affected by a suspected conspiracy, the DOJ's practice is not to use that information to determine the applicable Guidelines fine range to apply to the second-in company. Instead, the Guidelines range is calculated based on the volume of commerce affected by the suspected conspiracy as known to the DOJ at the time of the second-in company's cooperation. This exclusion can drastically reduce the second-in company's fine. In addition, a second-in company that provides cooperation that substantially advances an investigation is eligible for a substantial cooperation discount[15] and a fine below the minimum range under the Guidelines.

In addition to reduced fines, the DOJ has the discretion to confer additional rewards on second-in companies. For example, second-in companies can potentially obtain non-prosecution agreements for employees who cooperate fully in the investigation. When second-in companies cooperate early in an investigation and offer new and significant evidence, the DOJ will typically enter non-prosecution agreements for all but the highest-level culpable individuals, as well as employees who refuse to cooperate. Second-in companies also are more likely to qualify for Amnesty Plus if their internal investigation reveals antitrust violations in additional markets, or for affirmative amnesty if it is the DOJ that discovers the additional violation.

II. Setting the Fine Range

The Guidelines provide the framework for courts and the DOJ to determine appropriate fines for criminal violations of the Sherman Act. The Guidelines are not binding on courts or the DOJ,[16] but as a practical matter they are relied upon consistently to balance a variety of factors and ultimately determine a fine level for cartel violators. The DOJ also relies on the Guidelines when negotiating plea agreements with investigation targets. Corporate fines for antitrust violations are typically determined by: (1) determining the "volume of commerce," which is the dollar sales in the United States that were affected by the conspiracy; (2) multiplying the volume of commerce by 20% to calculate the "base fine"; (3) calculating a "fine range" by multiplying the base fine by "multipliers," which are determined by several factors; and (4) determining the fine within that range by applying other factors.[17] In some cases the ultimate fine may be above or below the range, or the range may be adjusted.

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[13] *See generally* "Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations," Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement Antitrust DOJ Department of Justice, March 29, 2006.

[14] Volume of commerce (VOC) calculations are discussed more fully in Section II.1. below.

[15] Guidelines §8C4.1.

[16] United States v. Booker, 543 U.S. 20 (2005).

[17] The statutory maximum fine for corporations under the Sherman Act is $100 million for each violation of the Act. 15 U.S.C. §1. The alternative fine provisions of the Sentencing Reform Act provide for a potentially greater

1) Volume of Commerce

The first step is to determine the "volume of commerce." The Guidelines define the volume of commerce attributable to a particular defendant as the "the volume of commerce done by him or his principal in goods or services that were *affected* by the violation."[18] This is meant to capture the United States sales of the products that were subject to the conspiracy (sales outside of the United States are not included in the volume of commerce). However, the Guidelines do not provide a precise definition of what "affected" means in this context, and the DOJ has provide little guidance.[19] Further, existing case law interpreting the phrase "volume of commerce . . . affected by the violation" is inconsistent. In particular, courts have disagreed on the extent to which it must be established that particular sales were made subject to the conspiracy.

The Guidelines do provide a helpful refinement for a scenario in which the conspirator did not have any sales affected by the conspiracy. For example, a defendant may agree not to submit a bid, or to submit an unreasonably high bid, on one occasion in exchange for its being allowed to win on a different subsequent bid. In such a case, if the defendant did not in fact win the subsequent bid, its volume of commerce would be zero despite its having engaged in the conspiracy and thus harming the purchaser. The Guidelines state that "[i]n a bid-rigging case in which the organization submitted one or more complementary bids, use as the organization's volume of commerce the *greater* of (A) the volume of commerce done by the organization in the goods or services that were affected by the violation, or (B) the largest contract on which the organization submitted a complementary bid in connection with the bid-rigging conspiracy."[20]

2) The Base Fine

The Guidelines provide that the base fine for a corporate defendant shall be derived from the greatest:

(1) The "offense level" and corresponding fine based upon a table set forth in the Guidelines;

(2) The pecuniary gain to the corporation from the offense; and

(3) The pecuniary loss from the offense caused by the organization. The Guidelines state that 20% of the volume of commerce shall be used as a proxy for the pecuniary loss caused from the offense.[21]

In practice, when negotiating a fine with the DOJ, the parties will almost always use 20% of the volume of commerce as the base fine. If the case proceeded to trial and the fine

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fine of "twice the gross gain or twice the gross loss" caused by the conspiracy. 18 U.S.C. §3571(d). As a practical matter the Sherman Act's maximum fine provision does not play a role in fine negotiations with the DOJ. The government regularly resorts to the alternative fine provision in antitrust cases, and has obtained fines in excess of $100 million on numerous occasions. The DOJ also typically will not negotiate fines in plea agreements with defendants who contest the gain or loss.

[18] Guidelines §2R1.1(b)(2) (emphasis added).

[19] Julia Schiller et al, *Toward Convergence: The Volume of "Affected" Commerce Under the U.S. Sentencing Guidelines and "Impact" Analysis Under the Clayton Act*, 18 GEO. MASON L. REV. 987, 991(2011) *citing* James M. Mutchnik et al, *The Volume of Commerce Enigma*, ANTITRUST SOURCE, June 2008, at 1, 2.

[20] Guidelines §2R1.1(d)(3) (emphasis added).

[21] *Id.* at §2R1.1(d)(1).

were subject to litigation, the government and defendant may dispute the base fine and in particular which of (1) – (3) above results in the greatest fine.

3) The Fine Range

a. Culpability Score

Once the base fine is determined, the next step is to determine the culpability score. The culpability score is meant to measure the seriousness of the defendant's violation. Once the culpability score is determined, the fine range can be calculated. In price-fixing cases, the starting culpability score is five points.[22] The following factors are then considered in whether to adjust the culpability score up or down:[23]

i. Involvement in the conspiracy (or awareness and tolerance of the conspiracy) by high-level personnel or employees with substantial authority. Up to five points may be added to the culpability score if evidence of this exists.

ii. The size of the organization or business unit whose employees conspired. If applicable, larger organizations or business units receive additional point increases.

iii. The organization's prior history. Where the organization committed the same or a similar violation within the last ten years, the culpability score increases by one or two points. If the organization's misconduct violates a judicial order, injunction, or condition of probation, another one point increase applies.

iv. Obstruction of justice. If the organization or its employees took steps to impede the investigation (including destruction of documents, data, or other evidence), or failed to take reasonable steps to prevent such impedance, three points are added.

v. Self-reporting, cooperation, and acceptance of responsibility. Up to five points may be subtracted from the culpability score based upon whether the organization self-reported (prior to government investigation), provided full cooperation in the investigation, and demonstrated recognition of and took responsibility for its conduct. An organization will typically receive at least a one point decrease in its culpability score for pleading guilty.

vi. Compliance and ethics program. The existence of an effective compliance and ethics program at the time of the offense may reduce the culpability score by up to three points (only, however, where the company self-reported promptly and no high level employees were involved). Typically this provision has not been the basis for a reduction in culpability score, although DOJ recently recommended a meaningful downward departure in the fines of at least two corporate defendants[24] on the basis of steps the defendant had taken to prevent recurrence of the offense. This reflects the credit that DOJ, in its discretion, may give to defendant companies that proactively implement rigorous antitrust compliance programs.

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[22] *Id.* at §8C2.5(a).
[23] *Id.* at §8C2.5(b)-(g).
[24] Barclays PLC in May 2015 and Kayaba Industry Co., Ltd. (a Japanese corporation that manufactures shock absorbers for U.S. vehicle manufacturers), in October 2015.

These factors reflect the major policy considerations underlying the U.S. cartel fining regime.

Once the culpability score is determined for a corporate defendant, the base fine is multiplied by applicable minimum and maximum multipliers set forth in a table in the Guidelines[25] to obtain the top and bottom of the fine range. The multipliers range from 0.05 to 4,[26] but the Guidelines provide that in cases involving price-fixing both the minimum and the maximum multiplier will be at least 0.75.[27]

III. Determining the Fine Within the Fine Range

1) Factors – Mandatory and Discretionary

After the fine range has been determined, a fine is generally set within that range. The judge or DOJ has discretion as to where within the range the ultimate fine will be. The Guidelines contain general and specific guidance regarding where within the range the ultimate fine should fall, identifying factors that "should" or "may" be considered.

In determining where within the range the fine shall fall, the court should consider:[28]

1) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization;
2) the organization's role in the offense, for example minimal versus as leader or organizer;
3) any collateral consequences of conviction, including civil obligations arising from the organization's conduct;
4) any nonpecuniary loss caused or threatened by the offense;
5) whether the offense involved a vulnerable victim;
6) any prior criminal record of an individual within high-level personnel of the organization or high-level personnel of a unit of the organization who participated in, condoned, or was willfully ignorant of the criminal conduct;
7) prior civil or criminal misconduct by the organization;
8) a culpability score either very high (more than 10) or very low (less than zero);
9) conditions relevant to the corporation's culpability score that existed but did not result in either an increase or decrease in the score;
10) the following statutory factors:[29]
    i. the defendant's income, earning capacity, and financial resources;
    ii. the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person

[25] Guidelines §8C2.6.
[26] *Id.*
[27] *Id.* at §2R1.1(d)(2).
[28] *Id.* at §8C2.8(b).
[29] 18 U.S.C. § 3572(a) (Factors to be Considered in determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine).

financially dependent on the defendant, relative to the burden that alternative punishments would impose;

iii. any pecuniary loss inflicted upon others as a result of the offense;

iv. whether restitution is ordered or made and the amount of such restitution;

v. the need to deprive the defendant of illegally obtained gains from the offense;

vi. the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;

vii. whether the defendant can pass on to consumers or other persons the expense of the fine; and

viii. if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense; and

11) whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program.

In addition, the court may consider the relative importance of any factor used to determine the fine range, including the pecuniary loss caused by the offense, the pecuniary gain from the offense, any specific offense characteristic used to determine the offense level, and any aggravating or mitigating factor used to determine the culpability score.[30]

For antitrust offenses, the most important factors are likely to be the seriousness of the offense and the harm caused (as reflected in the volume of commerce and culpability score), the organization's role in the offense, and the collateral consequences of conviction (for example the availability of treble damages in follow-on civil litigation). In at least one recent case, the DOJ accepted a corporate defendant's submission of evidence (including a report by an independent economist) that demonstrated that it was unable to pay a fine within the fine range. The DOJ engaged its own financial experts to verify the corporation's claim and ultimately agreed to a significantly reduced fine.[31]

In addition to such factors, the commentary in the Guidelines provides specific guidance under particular circumstances. For example, the Guidelines specifically guide courts to consider both the gain to the organization from the offense and the loss caused by the organization. The Guidelines also state that in cases involving complementary bids, sentences near the top of the fine range should be considered.[32]

2) Fine Increases Based upon Indirect United States Sales

The DOJ has taken the position in certain cases that the fine should be adjusted upward based on a defendant's "indirect sales." Indirect United States sales are sales of components that were manufactured and sold outside of the United States but were installed in, or

[30] Guidelines §8C2.8(a).

[31] GEO Specialty Chemicals Inc., an Ohio company, pled guilty for its role in a conspiracy to eliminate competition involving contracts to supply liquid aluminum sulfate to municipalities and pulp and paper manufacturers in the United States.

[32] The rationale for a higher fine in the complementary bid context is that the 20% percent volume of commerce proxy is likely to understate the seriousness of the offense. *See* Guidelines §2R1.1 cmt.

incorporated into, a product that was imported into the United States for sale. The volume of commerce calculations in the Guidelines are generally based upon direct United States sales, and the Guidelines do not provide guidance on how indirect United States sales volumes should or may be taken into account in volume of commerce.

The DOJ's methodology in this regard has been to: (1) estimate the volume of indirect United States sales of the relevant product; (2) calculate the ratio of indirect United States sales to the total of direct United States sales plus indirect United States sales; (3) subtract from this percentage a fifteen percent "safe harbor;" and (4) increase the bottom of the fine range by the resulting percentage.[33]

3) Departures from the Fine Range – Downward and Upward

The Guidelines also provides for departures from the fine range under special circumstances.[34] The court may depart downward where the corporation provided substantial assistance with the government's investigation. The government's motion must state that the cooperating company provided substantial assistance to the government in its investigation or prosecution.[35] The court determines the appropriate deduction based on the significance, usefulness, nature, extent, and timeliness of the organization's assistance.[36] The court may depart upward where special circumstances are found, for example where the organization has been convicted of previous antitrust violations. A court may also consider any aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing Commission in formulating the Guidelines that should result in a different sentence.[37] It is the DOJ's policy to seek Guidelines sentences unless a departure is warranted by the facts and law.[38]

4) Comity Considerations

Another factor the DOJ may consider is international comity. The DOJ and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations provide for the agencies to consider international comity in enforcing the antitrust laws, "including the extent to which the enforcement activities of another country with respect to the same persons,

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[33] *See, e.g.*, U.S. v. Hitachi Chemical Co., Ltd., Case 4:16-cr-00180-JD (N.D. Cal.). The recent Hitachi Chemical Co. Ltd. Plea contained an upward adjustment accounting for indirect sales. The Information against Hitachi Chemical states: "During the [relevant] time period . . . the charged combination and conspiracy had a substantial and intended effect in the United States, including on trade or commerce within the United States and U.S. import trade or commerce in electrolytic capacitors and products containing electrolytic capacitors." The government's sentencing memorandum reflects the inclusion of component import commerce: "The first upward adjustment accounts for the value of electrolytic capacitors sold outside the United States, but incorporated into personal desktop and laptop computers sold in the United States under major U.S. brands. By taking into account sales of capacitors made overseas, but incorporated into a major category of finished goods sold by U.S. companies, this adjustment further reflects the seriousness of the offense and its harm in the United States. U.S.S.G. §8C2.8(a)(1)."

[34] Guidelines §8C4.1 (a court may depart from the minimum Guidelines range upon a motion from the government). *See also id.* at §5K1.1 (providing departure for individuals).

[35] *Id.* at §8C4.1.

[36] *Id.* at §8C4.1.

[37] 18 U.S.C. §3553.

[38] *See* "Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants," Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement Antitrust DOJ Department of Justice, March 30, 2005, page 10, *available at* https://www.justice.gov/atr/speech/antitrust-sentencing-post-booker-era-risks-remain-high-non-cooperating-defendants.

including remedies resulting from those activities, may be affected."[39] Among the factors the DOJ take into account is "the effectiveness of foreign enforcement as compared to U.S. enforcement action."[40]

[39] United States Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations (April 1995), *available at* https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations.

[40] Id. at §3.2.

JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION´S SECTIONS OF INTERNATIONAL LAW AND ANTITRUST LAW ON ATTORNEY-CLIENT PRIVILEGE IN RESPONSE TO THE PUBLIC CONSULTATION ISSUED BY THE CABINET OFFICE OF THE GOVERNMENT OF JAPAN

July 10, 2014

The views stated in this submission are presented only on behalf of the Sections of International Law and Antitrust Law of the American Bar Association. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors, and therefore may not be construed as representing the policy of the American Bar Association.

The Sections of International Law and Antitrust Law (the "Sections") of the American Bar Association ("ABA") welcome the opportunity to provide comments to the Office of Examination of Anti-Monopoly Act Investigations Procedures, Cabinet Office of the Government of Japan (the "Cabinet Office"), regarding issues relating to the attorney-client privilege raised by the Japan Fair Trade Commission ("JFTC") on pages 15 and 16 of the Summary of Issues of Administrative Investigation Procedures under the Anti-Monopoly Act ("Summary of Issues") issued by the Cabinet Office.[1] The Sections appreciate the Cabinet Office´s and the JFTC's substantial thought and effort reflected in the Summary of Issues.

The Sections are available to provide additional comments or to participate in any further consultations with the Cabinet Office or the JFTC, as they deem appropriate. In particular, the Sections would welcome the opportunity to provide comments regarding the issues raised on pages 12-15 and 17-25, concerning the presence of an attorney during on-the-spot inspections and depositions, copying of materials obtained during on-the-spot inspections, securing verifiability of the process of deposition (including access to records of depositions and ability to take notes during depositions by parties), information disclosure for appropriate claims, and sharing knowledge of rules and practices on administrative investigations, which in the limited time available the Sections do not address in these comments. The Sections' over 30,000 members include attorneys from all over the world and their comments reflect the members´ expertise and experience with issues of attorney-client privilege and investigative procedures in the United States and in other jurisdictions worldwide.

[1] The Sections' comments are based on a tentative translation of the Summary of Issues posted by the Cabinet Office at http://www8.cao.go.jp/chosei/dokkin/pubcomm/m-03.pdf. The drafting group includes Javier Canosa, Wayne J. Carroll, Jennifer M. Driscoll-Chippendale, Michael Inouye, and Fabian Martens, led by Javier Canosa. The views stated in these comments do not necessarily reflect the views or opinions of the professional organizations with which the members of this drafting group are affiliated.

GENERAL COMMENTS

The attorney-client privilege is one of the oldest evidentiary privileges recognized in Anglo-American jurisprudence. Reference to the principles underlying the privilege can be traced as far back as the Roman Republic and 16th century English common law.[2] The earliest express recognition of the attorney-client privilege found in U.S. federal law is in 1888.[3] Since then, the concept of confidentiality in attorney-client communications has evolved as an ethical requirement in the rules of professional responsibility for every state of the United States. In Asia, the privilege was most recently found by the High Court of the Hong Kong Special Administrative Region, Court of First Instance, to be a human right that may be waived only in very limited circumstances.[4]

Courts in the U.S. recognize the attorney-client privilege in the following circumstances: (1) where legal advice is sought; (2) from a legal professional adviser in that capacity; (3) the communications relating to that purpose; (4) that are made in confidence; (5) by the client; (6) are at the client's instance permanently protected; (7) from disclosure by the client or the legal adviser; (8) unless waived.[5] Any waiver of the privilege must be intentional and voluntary.[6] The attorney-client privilege is not absolute; there are limited exceptions, such as communicating an intention to commit future crimes or fraud.[7]

The ABA, the world's largest voluntary association of attorneys, with nearly 400,000 members from around the world, has adopted resolutions establishing ABA policy addressing the importance of the attorney-client privilege in the legal profession and the enhancement of the rule of law. In 1997, for example, the House of Delegates of the ABA expressly adopted the principle that the attorney-client privilege for communications between in-house counsel and their clients should have the same scope and effect as the attorney-client privilege for communications between outside counsel and their clients.[8] With regard to

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2 *See* Edna Selan Epstein, The Attorney-Client Privilege and Work Product Doctrine 2 (4th Ed. 2001); Hon. Dick Thornburgh, Waiver of the Attorney-Client Privilege: A Balanced Approach, Washington Legal Foundation (Wash., D.C. 2006).

3 Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

4 Chinachem Financial Services Limited v. Century Venture Holdings Limited, [2014] 2 HKLRD 557 at ¶¶ 132-135 (Court of First Instance, March 25, 2014).

5 *See*, *e.g.*, 8 John Henry Wigmore, Evidence in Trials at Common Law § 2292, at 554 (McNaughton 1961 & Supp. 1991).

6 Federal Rules of Evidence 502(a)(1), (c).

7 *See U.S. v. Zolin*, 491 U.S. 554, 562-63 (1989).

8 ABA, 1997 Report with Recommendation #120 (Policy adopted Aug. 1997), 1997_AM_120 *available at*

the privilege in connection with foreign lawyers, the ABA recommended as early as 1983 (and again in 2008) that the European Commission ("EC") extend the same level of protection granted to communications between a client and its lawyer practicing in a member state of the European Union ("EU") to communications with a U.S. lawyer.[9] In both 1983 and 2008, the ABA also urged the EC to extend the privilege to in-house counsel.[10]

In 2005 the ABA Task Force on the Attorney-Client Privilege ("Attorney-Client Task Force") reported that:

> "Lawyers have always been understood to play a critical role in preserving legal rights, compliance with the law, and ultimately, the rule of law. As the law becomes increasingly complex, the need for lawyers has become increasingly essential. Further, the confidentiality of the attorney-client relationship has historically been considered an essential aspect of legal representation, and one that is necessary to ensure the ability of lawyers to carry out their assigned role in the legal system. The confidential relationship is recognized and preserved not only in the common law regulating the lawyer-client relationship and in the rules of professional conduct, but in the attorney-client privilege…"[11]

The Attorney-Client Task Force highlighted some of the important attributes of the attorney-client privilege, noting that the privilege: (i) fosters the attorney-client relationship; (ii) encourages client candor; (iii) fosters voluntary legal compliance; (iv) promotes efficiency in the legal system; and (v) enhances the constitutional right to effective assistance of counsel.[12]

In 2005, the House of Delegates of the ABA adopted resolutions reiterating its long-standing support of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3)

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http://www.americanbar.org/content/dam/aba/directories/policy/1997_am_120.authcheckdam.pdf.

[9] ABA, 1983_Report with Recommendation # 301 at 1 (Policy adopted Feb. 1983, Re-activated Feb. 2008), 2008_MY_301 *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2008_my_301.authcheckdam.pdf.

[10] *Id*.

[11] ABA, 2005_ Report with Recommendation #111 at 3-4 (Policy adopted Aug. 2005), 2005_AM_111 *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2005_am_111.authcheckdam.pdf.

[12] *Id*. at 8-12.

ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice. The ABA specifically opposed policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and supported policies, practices and procedures that recognize the value of those protections.[13]

Finally, as the Summary of Issues reported, a Japanese court has found that, at least in criminal cases, "[f]or defendants to receive effective and appropriate assistance from lawyers, it is essential for defendants and lawyers to communicate freely without [an] investigation agency knowing, so that defendants can provide lawyers with necessary and sufficient information and lawyers can offer appropriate advice to defendants."[14] The ABA believes that this need extends to all proceedings.

CONCERN THAT THE ATTORNEY-CLIENT PRIVILEGE MAY HINDER FACT-FINDING.

The Sections commend the Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act (the "Advisory Panel") for weighing the proper balance between the JFTC's fact-finding ability against the right to a fair defense. The JFTC has expressed concern that recognizing the attorney-client privilege could impede fact-finding by enforcers. The JFTC apparently is unaware of any case in which a document that would be subject to attorney-client privilege has constituted conclusive or necessary evidence in JFTC cases, but is concerned that not having access to privileged communications between a defendant and its counsel could make it difficult to prove violations.[15] The JFTC has also asserted that the lack of an attorney-client privilege has apparently not inhibited in-house investigations in support of leniency applications, or prevented businesses from communicating with attorneys.[16]

The Sections believe that the attorney-client privilege in fact does not materially impede fact-finding by enforcers. As a threshold matter, the privilege is focused, shielding only the confidential communications between a client and counsel for the purpose of seeking legal advice. It does not protect the underlying facts (even if communicated to counsel) or other types of communications that would not be covered by the privilege from being discovered and used in prosecutions, such as communications that were not made for the purpose of obtaining legal advice, including communications made in furtherance of misconduct or of business objectives, or that were not made in confidence.[17]

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13 *See id*. at 1.

14 Summary of Issues at 16 n. 5.

15 *Id.* at 15-16.

16 *Id.* at 16.

17 *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981).

In addition, recognizing the privilege actually promotes observance of the law and the administration of justice, by encouraging businesses to investigate and correct possible wrongdoing. The purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients," which, in turn, has a profound and beneficial effect on the overall system of justice.[18] The most effective way of eliciting true and unvarnished communication is to do so in confidence so as to eliminate any inhibition or apprehension by a client in relaying his or her case to his or her lawyer. A client is unlikely to extend his or her complete trust to his or her lawyer if a confidence is not protected and must be shared with other parties, including the opposing party and the judicial body itself. Enabling a lawyer to hear all of the facts, encouraged under the protection of privilege, allows the attorney to formulate an effective legal strategy and offer sound legal advice based on actual facts and circumstances.

CONCERN THAT, WHILE OTHER JURISDICTIONS WITH AN EFFECTIVE ATTORNEY-CLIENT PRIVILEGE INCENTIVIZE VOLUNTARY COOPERATION, SUCH INCENTIVES ARE WEAK IN JAPAN

The Sections applaud the Advisory Panel's effort to consider how Japan's investigative procedures promote or diminish consistency across jurisdictions. The JFTC argues that in Japan, there are insufficient incentives for businesses to cooperate in investigations, identifying in particular the lack of a discretionary surcharge system and unavailability of tough sanctions against obstructing investigations.[19] Accessing a company's confidential communications with its counsel is apparently intended to counter-balance those deficiencies.

The Sections respectfully suggest that the better course is to address the issue of incentives for voluntary cooperation under Japanese law directly, through the adoption of a discretionary surcharge system and obstruction sanctions, rather than by banning the attorney-client privilege in JFTC investigations. The very successful U.S. and EU leniency programs demonstrate the merits of this approach.

The JFTC also noted that attorney-client privilege issues are not unique to competition law and expressed concern about introducing recognition of the privilege for Anti-Monopoly Act procedures alone. The Sections agree that an attorney-client privilege should be universal, rather than limited to certain types of proceedings.

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18 *Id*. at 389.

19 The JFTC also expressed concern that an attorney-client privilege may be abused. The Sections believe that the legal profession in Japan is of high integrity and any abuses would be appropriately disciplined.

UNDERSTANDING THAT THERE IS A U.S. CASE HOLDING THAT ATTORNEY-CLIENT PRIVILEGE IS NOT WAIVED IF THE INFORMATION IS DIVULGED PURSUANT TO COMPETENT AUTHORITY, AND THAT, ACCORDINGLY, DISCLOSURE OF INFORMATION TO THE JFTC SHOULD NOT AFFECT ATTORNEY-CLIENT PRIVILEGE IN FOREIGN JURISDICTIONS.

The Sections commend the Advisory Panel for examining the important issue of how the lack of an attorney-client privilege in administrative investigations conducted by the JFTC would impact requests in U.S. proceedings for evidence obtained during these investigations. The JFTC states that in the United States, some courts have concluded that attorney-client privilege is not waived in federal court proceedings when a company is ordered to disclose attorney-client communications by non-U.S. government authorities.[20]

However, there is actually a lack of binding judicial precedent in the U.S. on the applicability of the attorney-client privilege in such situations that provides little assurance on this issue. The U.S. rulings declining to require disclosure of materials provided to foreign governmental agencies are premised on principles of comity, [21] rather on any recognition of attorney-client communications or attorney work product. Additionally, U.S. federal courts have also addressed the adoption of foreign privilege laws through a choice of law analysis. The issue of foreign privileges tends to arise in U.S. courts if: (1) a foreign privilege is implicated in a claim involving a federal question;[22] or (2) an argument

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[20] Summary of Issues at 16.

[21] The five factors relevant to a comity analysis are: (1) the importance to the litigation . . . of the documents or other information [requested]; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." *Société Industrielle Aérospatiale v. U.S. District Ct. for So. District of Iowa*, 482 U.S. 522, 544 n.28 (1987) (citation omitted). In comparison, disclosure compelled in state court does not result in waiver of the privilege in federal court. Fed. R. of Evidence 502(c).

[22] Under a claim involving a federal question, the federal common law would determine which privilege laws would apply. One choice of law analysis method used by U.S. courts in determining which privilege law should apply is the *touch base* test. Under the "touch base" test, if the communication has nothing to do with, or is only incidental to, the United States, the foreign rules of privilege would apply; however, if the communication has more than an incidental connection to the United States, the court will conduct a more traditional analysis and defer to the law of privilege of the country with the most direct and compelling interest in the communication. *See Golden Trade S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 520 (S.D.N.Y. 1992). There have been exceptions to the touch base test for policy reasons, including a ruling by a U.S. District Court which rejected applying a foreign privilege law because it was supported by a different system of discovery and, therefore, incongruent to American policy interests when applied partially in a U.S. court. *See Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92 (S.D.N.Y 2002).

is made that a foreign privilege should attach to evidence in a state law claim being tried in a federal court.[23]

No U.S. appellate court—much less the U.S. Supreme Court—has ruled whether the attorney-client privilege or work product doctrine extends to evidence and communications submitted to foreign enforcers.[24] The several trial courts that have addressed the issue reached inconsistent results, precisely because they assessed the request based on the specific facts and circumstances often under a comity analysis instead of under the attorney-client privilege.[25]

In In re Vitamins Antitrust Litigation,[26] the defendants submitted documents that they believed to be protected by attorney-work product in their home jurisdiction at the request of foreign government agencies conducting an investigation. The defendants argued that any request by foreign government agencies should be deemed "compelled" because of the serious consequences of not complying, including relinquishing a claim for leniency. The U.S. District Court addressed the issue of waiver of the attorney-client privilege in a U.S. court if a privileged document is disclosed under *compulsion* in a foreign jurisdiction.[27] The court opined that "compulsion avoiding waiver requires that a disclosure be made in response to a court order or subpoena or the demand of a governmental authority backed by sanctions for non-compliance, and that any applicable

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[23] If a party contends that foreign privilege laws should apply to a state law claim tried in a U.S. federal court, the determination would rest with the choice of law rules of the state of the sitting court. A small minority of state courts rely upon a *territorial approach*, in which the local privilege laws apply without any external considerations. However, a majority of states use the *most significant relationship* principle in determining which forum's privilege law would apply. *See Wolpin v. Phillip Morris, Inc.*, 189 F.R.D. 418, 423-4 (C.D. Cal. 1999). In determining the location of the most significant relationship, courts have considered: (1) the number and nature of contacts in the forum state; (2) the relative materiality of the evidence sought to be excluded; (3) the kind of privilege involved; and (4) fairness to the parties. Restatement (Second) Conflict of Laws, section 139, cmt. d. "Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum." *Id*. at subsection 1.

[24] Defendants in U.S. private damage actions routinely furnish plaintiffs with documents subpoenaed by the Antitrust Division of the U.S. Department of Justice without any suggestion that the production vitiates attorney-client privilege in the civil litigation. *See*, *e.g.*, *In re Milk Prods. Antitrust Litig.*, 84 F. Supp. 2d 1016 (D. Minn. 1997) (documents provided to state and federal entities must be turned over to plaintiffs; privileged documents could be withheld with appropriate factual support).

[25] For example, the U.S. District Court for the Northern District of California affirmed a Special Master's Report denying plaintiff's motion to compel the production of documents submitted to the European Commission because the information sought was deemed relatively unimportant and could be obtained through alternative channels. *See In re Methionine Antitrust Litig.*, M.D.L. No. 00-1311 CRB (N.D. Cal. June 17, 2002).

[26] Misc. No. 99-197 (TFH), MDL No. 1285, (2002) U.S. Dist. LEXIS 26490 (D.D.C. Jan. 23, 2002); (2002) U.S. Dist. LEXIS 25815 (D.D.C. Dec. 18, 2002).

[27] (2002) U.S. Dist. LEXIS 26490 at *105.

privilege be asserted."[28] In other words, normal acquiescence to the laws of disclosure in another country does not afford immunity from waiver in a U.S. court. In applying this standard, the court concluded that the defendants' compliance with foreign government agencies in specified countries, including Japan, was not compelled and not exempted from a waiver of privilege.[29] Ultimately, the court ordered defendants to produce corporate statements made to the European Commission after determining that "concerns raised by the EC . . . were outweighed by the United States' interest in open discovery and enforcement of its antitrust laws," given that some of the information originated in the United States and could not be obtained through other means.[30] Nonetheless, the court in the same opinion ruled that although voluntary submissions of attorney work product to a Canadian law enforcement agency resulted in a waiver of protection, those documents would be shielded from disclosure under principles of comity to avoid revealing Canada's enforcer's negotiating position out of respect for that country's investigative processes.[31]

This uncertainty pervades more recent opinions. Some courts have noted the chilling effect that ordering production of evidence gathered by foreign agencies would have on leniency programs and denied plaintiffs' motions to compel.[32] However, others accord greater deference to the principles of U.S. discovery.[33] Given the lack of higher court precedent and the discretionary nature of a comity analysis, the outcome of any given request for evidence remains uncertain. And as the U.S. Supreme Court stated: "If the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all."[34]

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28 Id.

29 Id.

30 (2002) U.S. Dist. LEXIS 25815 at *22-23.

31 Id. at *27-28.

32 *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 05-MD-01720 (JG) (JO), Mem. & Order (E.D.N.Y. Aug. 27, 2010) (denying motion to compel production of documents submitted as part of the European Commission's investigation of interchange fees); *In re Static Random Access Memory ("SRAM") Antitrust Litig.*, 07-CV-01819CW, Mem. & Order (N.D. Cal. Jan. 5. 2009) (denying motion to compel); *In re Rubber Chems. Antitrust Litig.*,486 F. Supp. 2d 1078, 1083 (N.D. Cal. 2007) (denying motion to compel where the importance of relevant documents submitted to the European Commission was dubious given that the litigation focused on the U.S. market and plaintiff already had documents from the U.S. investigation).

33 *See*, *e.g.*, *In re Flat Glass Antitrust Litig.*, 08-MC-00180-DWA, Proposed Order (W.D. Pa. July 2, 2009) (ordering defendant to produce documents provided to or received from the European Commission).

34 *Upjohn Co. v. United States*, 449 U.S. at 393.

Consequently, a disclosure of privileged material to the JFTC may result in a waiver of the attorney-client privilege in a U.S. court.[35]

CONCLUSION

The Sections urge the adoption in Japan of the attorney-client privilege in all types of proceedings.

[35] Moreover, even if there is no waiver of the attorney-client privilege in the U.S., there may still be a waiver of the privilege in other jurisdictions.

Best Practices for Antitrust Procedure: The Section of Antitrust Law Offers Its Model

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Antitrust law seeks to benefit consumers by prohibiting anticompetitive agreements, acts of monopolization/abuse of dominance, and anticompetitive mergers and other structural transactions. Undertaking the quest, however, does not guarantee reaching the goal. Antitrust rules and remedies may be inadequate (allowing harmful market conduct) or excessive (chilling desirable conduct). Members of the antitrust community (practitioners, enforcement officials, scholars, economists, policymakers, and business leaders) continuously debate how enforcement should be adjusted to find the "Goldilocks Zone," where legal tools are "just right" when judged by their effectiveness in serving antitrust law's ultimate objectives.

Recent years have witnessed an increasing recognition that antitrust procedure—like substantive rules and remedies—constitutes another dimension of the quest for appropriate balance. Enforcement aspires to be accurate, efficient, and impartial—both in reality and perception. Procedure can have a profound influence on the ability of antitrust enforcement to fulfill those aspirations. Recognizing this reality, a number of public international organizations have launched projects to improve antitrust procedure, with encouragement and support from the antitrust community. For example, shortly after its formation, the International Competition Network launched a major project that ultimately led to consensus adoption of "Recommended Practices for Merger Notification and Review Procedures."[1] More recently, the ICN adopted "Guidance on Investigative Process" (ICN Guidance) at its 2015 annual conference.[2] The ICN Guidance contains good practice standards applicable to agencies that operate within all types of legal and enforcement systems regarding transparency to the public, transparency to and engagement with parties to investigations, and protection of confidential information.

Enforcers have also launched procedural initiatives, recognizing that procedures that are accurate, efficient, and impartial bring multiple benefits to their agencies. These initiatives include ensuring that the agency hears the parties' view of the facts, the evidence, and how the law applies, resulting in better informed agency decisions and conferring legitimacy on the agency's enforcement activities as perceived by affected parties and by the domestic and international antitrust communities. Similar initiatives have been pursued in the OECD[3] and in negotiations of

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[1] International Competition Network, Recommended Practices for Merger Notification and Review Procedures, http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf.

[2] International Competition Network, ICN Guidance on Procedural Fairness, http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.

[3] Organization for Economic Cooperation and Development, Transparency and Procedural Fairness (2012), http://www.oecd.org/competition/mergers/proceduralfairnessandtransparency-2012.htm. *See also* Asia Pacific Economic Cooperation (APEC), http://www.apec.org/Meeting-Papers/Leaders-Declarations/1999/1999_aelm/attachment_apec.aspx; APEC Principles to Enhance Competition and Regulatory Reform (Sept. 13, 1999), http://www.apec.org/Meeting-Papers/Leaders-Declarations/1999/1999_aelm/attachment_apec.aspx.

bilateral (U.S.-Chile,[4] U.S.-Korea[5]) and multilateral (Trans-Pacific Partnership[6]) trade agreements. There has also been a private sector initiative in this area by the International Chamber of Commerce's Competition Commission.[7]

The increasing intensity of discussion and initiatives regarding procedure was duly noted by the ABA Section of Antitrust Law and its International Task Force (ITF). In its role as the main vehicle for Antitrust Section and ABA input on antitrust issues at enforcement agencies worldwide, the ITF coordinates the submission of Section comments involving antitrust procedure to numerous foreign agencies (often jointly with the ABA Section of International Law). Although other bodies had addressed antitrust procedures, the ITF concluded, based on the long U.S. experience in implementing antitrust law and the Section's strong expertise and reputation, that the Section could make a valuable contribution to the international dialogue on these issues. Ultimately the ITF proposed a thematic approach to this topic, as distinct from only responding to individual consultations by agencies (by far the most common mode of ITF activity).

[T]he Report is targeted at a fundamental type of proceeding common to all systems of antitrust or competition law enforcement—specifically, proceedings conducted by a government agency seeking to determine whether an infringement of competition rules has occurred and, if so, to formulate and apply a remedy.

Following discussion of this change in approach, in 2013 then-incoming Section Chair Christopher Hockett launched a variety of Section initiatives focused on procedure, including (among others) a request to the ITF for a report that would survey scholarship concerning antitrust procedure and suggest whether, and if so how, the Section could contribute to the international dialogue on procedural aspects of antitrust enforcement. The ITF initiative continued under Chris Hockett's successors, Howard Feller and Roxann Henry.

In January 2015, the Section's Council accepted the ITF's Report and approved its three principal recommendations—that the Section: (1) attempt to formulate best practices for antitrust procedure; (2) identify mechanisms to enhance the effectiveness of Section outreach and contributions to policy dialogue on antitrust procedure (such as that occurring in the international antitrust organizations); and (3) identify specific research topics (legal, empirical, economic, or otherwise) that might deserve Section encouragement or support in pursuit of better information to enhance the quality of policy dialogue about antitrust procedure. The Council approved the ITF's consensus proposal for Best Practices for Antitrust Procedure in June 2015. The approved text of the Report on Best Practices for Antitrust Procedure (Report) is reproduced below.

A few brief framing remarks are in order. First, the Report is targeted at a fundamental type of proceeding common to all systems of antitrust or competition law enforcement—specifically, proceedings conducted by a government agency seeking to determine whether an infringement of competition rules has occurred and, if so, to formulate and apply a remedy. This excludes a variety of other enforcement agency activities, such as conducting industry studies, participating in proceedings between private parties (e.g., as an amicus curiae), participating in proceedings under other regulatory systems, public advocacy for competition and antitrust policy, and formulating or reacting to proposals for legislative change in antitrust law, to name just a few. These other activities can be vital to the success of an enforcement program, but government proceedings to assess and remedy possible infringements form the canonical tool of antitrust

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[4] United States-Chile Free Trade Agreement, art. 16, June 6, 2003, https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file616_4010.pdf.

[5] Free Trade Agreement Between the United States of America and the Republic of Korea, ch. 16 (June 30, 2007), https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file193_12715.pdf.

[6] Trans-Pacific Partnership, Oct. 5, 2015, ch. 16, https://ustr.gov/sites/default/files/TPP-Final-Text-Competition.pdf.

[7] International Chamber of Commerce Commission on Competition, Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings (Aug. 30, 2010), http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2010/Recommended-framework-for-international-best-practices-in-competition-law-enforcement-proceedings/.

enforcement, and they are a—if not *the* leading source—of questions about the quality of procedure in antitrust enforcement.

Second, the Report proposes best practices for each distinct phase of government infringement proceedings from inception of an investigation through first level review of the first-instance determination regarding an infringement. The process is analyzed in five distinct phases: Investigation, Asserting Contentions of Infringement, Assessing Contentions of Infringement, First-Instance Decision, and Review. (The Report concludes with a short list of key practices relevant to all phases of the process.) Thus, at least within the specific sphere of government infringement proceedings, the Report attempts to be comprehensive.

Third, in suggesting best practices, no presumptions are made regarding the superiority or inferiority of any particular system—common law versus civil law, adversarial versus inquisitorial, or administrative versus prosecutorial/judicial. Best practices are selected only on the basis of their capacity to help assure accurate, efficient, and impartial antitrust enforcement. The ITF's initial Report to the Section Council had included, at the Chair's request, a stock-taking of existing scholarship on antitrust procedure. The ITF's experience in compiling that very extensive list demonstrated (1) that procedure has been a frequent topic of study and commentary in numerous antitrust enforcement systems around the world, and (2) the scope and variety of antitrust procedures in use across the more than 100 jurisdictions that actively enforce antitrust laws are so profound as to almost defy characterization. Accordingly, identifying best practices that are relevant only in the context of a specific system of procedure would severely limit the utility of the Report. Thus, the selection was heavily influenced by a desire to focus on practices that could be understood and applied to a broad variety of specific systems and jurisdictions. In addition, the recommendations are based on the premise that basic principles of accurate, efficient, and impartial procedure should apply across all types of enforcement systems.

[T]he Report proposes best practices for each distinct phase of government infringement proceedings from inception of an investigation through first level review of the first-instance determination regarding an infringement.

Those interested in comparing the Report with the ICN Guidance will see numerous similarities, but one major contrast: while the Report identifies best practices for each of the five previously noted distinct phases of government proceedings (Investigation, Asserting Contentions of Infringement, Assessing Contentions of Infringement, First-Instance Decision, and Review), the ICN Guidance is limited to the investigation phase. Within the ambit of the investigation phase there are numerous similarities between the good practices identified in the Report and the ICN Guidance. Some notable common principles include that (1) agencies should seek evidence broadly rather than limiting their inquiry to complainants and/or targets, (2) applicable substantive rules and procedures should be adequately disclosed so that parties are able to know in advance the legal framework that applies to their conduct, and (3) parties should be permitted to present all aspects of a defense, including expert economic analysis among others.

The ITF is currently working on implementing the other two ITF recommendations the Council approved in 2014—enhanced outreach and identification of worthy research topics relevant to antitrust procedure. We hope that through discussion of the Report and the other supporting efforts, the Section will reaffirm its best traditions and also contribute to progress in assuring that antitrust proceedings are accurate, efficient, and impartial, both in reality and as perceived by the antitrust community and the broader public.[8] ●

[8] The authors of this article express their great appreciation for the hard work and many contributions of all who brought the Report to fruition. The Report was a collaborative effort undertaken primarily by a subgroup of the International Task Force, including (in alphabetical order) William Blumenthal, Rachel Brandenburger, Terry Calvani, Neil Campbell, Jennifer Driscoll, Damien Geradin, Elizabeth Kraus, and James Rill. The various drafts were reviewed, edited, and commented upon by the other members of the International Task Force, by Deborah Garza (the Section's International Officer at the relevant times) and, finally, by other Council members. The project benefited greatly from the continuous support of Section Chairs Christopher Hockett, Howard Feller, and Roxann Henry.

BEST PRACTICES FOR ANTITRUST PROCEDURE

REPORT OF THE ABA SECTION OF ANTITRUST LAW INTERNATIONAL TASK FORCE
May 22, 2015

INTRODUCTION

Among numerous policy studies and reform efforts underway throughout the global antitrust and competition-law community (enforcement officials, private antitrust-law practitioners, antitrust economists and academics, among others), significant recent interest has focused on improving antitrust procedures. Merger review procedures were among the first areas targeted for study and for proposals regarding best or recommended practices, but more recently interest in reform of procedures has broadened to include all the main areas of antitrust enforcement.

As new antitrust laws and agencies continue to expand globally, an increasing variety of legal methods and institutions has been applied to competition matters. This offers both opportunities and challenges: on one hand this increased diversity allows comparison of different procedures, which may help identify those rules, institutions and other mechanisms that are most conducive to impartial, efficient and accurate enforcement. On the other hand, the increasing variety of the systems encountered in antitrust enforcement creates new challenges in developing principles and approaches likely to be widely accepted and implemented.

Adopting procedures that promote the impartiality, efficiency and accuracy of antitrust decisions can help achieve basic competition goals. Procedures that allow agencies to obtain and test relevant evidence, as well as the legal and economic approaches and analyses that inform their decisions regarding infringement and remedy, can enhance significantly the overall quality of enforcement decisions. This facilitates vigorous competition within established legal constraints and ultimately enhances productivity and consumer welfare. Moreover, procedures that are—and are rightly perceived to be—accurate, efficient and impartial will enhance respect for competition law and its enforcement institutions and processes among counterpart agencies, within the business community, among consumers and by the general public.

As the latest development in a process that began several years ago, the ABA Section of Antitrust Law's International Task Force has developed this proposal for best practices for antitrust procedure. This proposal is intended to stimulate and contribute to ongoing global dialogue on this fundamental subject, adding the perspective of the world's oldest and largest association of antitrust professionals to current efforts to improve antitrust procedures. This proposal has been formulated based only on the anticipated ability of these practices to contribute to the impartiality, efficiency and accuracy of antitrust decisions. No specific system of enforcement—adversarial or inquisitorial, common-law or civil-law, judicial or administrative—has been assumed superior in its relevant capabilities.

The best practices listed below are considered relevant to the conduct of any antitrust proceeding, defined as a process for determining whether one or more specific individuals or business organizations have infringed applicable competition-law standards, and to prescribe and enforce a remedy for such infringement. Antitrust enforcement involves many activities that do not fall into this category: competition advocacy, general market or industry studies (other than those that can lead to the imposition of remedies for identified anticompetitive practices), or amicus par-

ticipation in judicial proceedings between private parties, just to name some of the most obvious. Such activities were not considered as part of the subject matter of this report, although they can each be vital to the broader success of a competition-law enforcement system.

The Report also does not address any but the most fundamental principles that govern the conduct of public officials and private parties engaged in the antitrust enforcement process. Thus, for example, aside from the most elementary protections against corrupt influence of the decision making process, rules of conduct for public officials or private parties are not included although they are obviously essential to sound antitrust enforcement. This report presupposes that such individuals and entities are subject to their own professional, legal, and other disciplines that assure orderly engagement with antitrust enforcement processes. Such practices may facilitate dialogue and compliance with applicable procedural rules, and are also likely to enhance efficient and accurate enforcement.

The proposed best practices have been divided into six specific categories, five of which correspond to conceptually distinct stages of an antitrust proceeding as it is defined in this proposal: (1) Investigation, (2) Asserting Contentions of Infringement, (3) Assessing Contentions of Infringement, (4) First-Instance Decision and (5) Review. We conclude with a brief list of best practices applicable at all stages of an antitrust proceeding.

ANTITRUST PROCEDURES—BEST PRACTICES

I. INVESTIGATION

A. In conducting investigations and seeking evidence, officials should make every reasonable effort to define clearly the specific potential legal, factual and economic contentions being considered.

B. Officials should adopt management practices designed to help ensure that the expected costs and other burdens of investigation—including those imposed upon targets and others who provide information or otherwise cooperate with the investigation—are proportionate to the expected value of the evidence sought. The expected significance of the potential competitive harm also should be considered in making this assessment.

C. At key points in a pending investigation (or periodically) officials should specifically reassess the potential contentions and tailor the investigation accordingly.

D. Officials should strive for balance, pursuing and considering both exculpatory and inculpatory evidence and analysis.

1. Officials should not limit pursuit or consideration of exculpatory evidence to that provided by targets' counsel. Officials should pursue and consider potentially exculpatory evidence from third parties, especially when such evidence may not otherwise be available to targets or their counsel.

E. At key points in a pending investigation (or periodically) officials should disclose (subject to limitations reasonably reflecting and tailored to any legitimate concerns such as the preservation of evidence of covert criminal behavior or maintaining confidentiality of business secrets) all potential contentions of infringement and (in reasonable detail)

the underlying evidence, analysis and argumentation relevant to the defense, to targets and their counsel, and provide reasonable opportunities for and carefully consider all responses to such disclosures (including submissions as to facts, economic analysis, legal analysis, policy, and other forms of argumentation). Targets and counsel for targets should have reasonable opportunities to present such responses in face-to-face meetings with officials conducting the investigation and with officials managing the investigation. Subject to the foregoing, officials should maintain the confidentiality of evidence and all other aspects of the investigation (including its existence).

F. Officials should apply credible objective checks and balances to the process of investigation to ensure adherence to the foregoing practices.

1. It is important for officials to establish management practices that limit susceptibility of their processes to confirmation bias and other institutional characteristics that may allow or even encourage officials to broaden or persist with investigations beyond the point that disinterested analysis would consider well supported. Periodic review of investigations by retained experts with the ability and incentives to provide objective independent views may be one such practice; others might include the development of specialized offices or other units (a staff including experts in competition economics, law, and/or the particular sector involved) internal to the investigating institution or to another institution, subject to safeguards for their objectivity, independence and candor.

G. Prior to the time when any contention of infringement is asserted, each target should be provided with all evidence (regardless of whether subject to any assertion or finding of confidentiality) then known to officials and upon which they intend to rely in support of such contention. Each target should be provided with the opportunity to present a full response, including as to all matters of fact, economic and other expert analysis, legal, policy and other argumentation. Protections for material reasonably regarded as confidential should be afforded by such mechanisms as restricting access to counsel or outside counsel only, use of data rooms (physical or virtual), or disclosure pursuant to protective order. A target should be permitted to present its response through documentary submissions and through face-to-face presentation to the official(s) responsible for making any contention of infringement.

H. The disclosure of an investigation, or the possibility of a future investigation, should ensure that targets and/or potential targets are not prejudiced or otherwise unnecessarily disadvantaged. Such disclosure should be accompanied by a clear statement that there has been no contention of infringement, and that any future such contention would be subject to assessment on the merits.

II. ASSERTING CONTENTIONS OF INFRINGEMENT

A. The official decision to make a contention of infringement should be based on a well-considered assessment, including balanced and conscientious evaluation of both exculpatory and inculpatory evidence, that the completion of proceedings (including obtaining a final determination of infringement and defining, implementing and administering a remedy) is highly likely to serve the fundamental purposes of competition

law. A contention of infringement should include a clear explanation of the evidence and the legal and economic theories and analyses that support it.

B. A contention of infringement, and the pursuit of remedies, should not be fashioned for any inappropriate purposes, including, for example: (1) primarily to prevail in infringement proceedings independent of any substantial competitive benefit; or (2) primarily to obtain any advantage over or concession from a target that is not directly justified by the competition law purposes of proceedings.

1. Key competition-law concepts such as "restraint of trade," "restriction of competition," "abuse of dominance," "exclusionary conduct," "substantial adverse impact on competition," "substantial lessening of competition" and the like are inherently broad and flexible. Accordingly, assessing contentions of infringement of these laws often involves complex factual, economic and policy assessments of numerous interacting factors. Some circumstances exist in which it is possible for officials to secure a determination of infringement even where it might be questionable whether this would serve fundamental purposes of competition law. Moreover, some accused targets that may ultimately be entitled to exoneration may have powerful private reasons to avoid contesting official assertions of infringement—to avoid the substantial expense, disruption, extended periods of legal, financial and commercial uncertainty, public opprobrium, and/or contentious relationships with a public institution associated with fully contested proceedings—leading such targets to settle quickly and/or by making concessions that exceed the relief that ultimately might be justified. This may create temptation for officials to press investigations—consciously or unconsciously—beyond the point that best serves fundamental purposes of competition law.

C. No official contention of infringement should be made before providing respondents a genuine opportunity to settle the matter by consent without additional contested proceedings.

D. The process of publicizing a contention of infringement should ensure that such publication does not prejudice or otherwise unnecessarily disadvantage respondents. Specifically, publication of any contention of infringement should be accompanied by a clear statement that such contention is subject to assessment on the merits and does not constitute a determination or finding of infringement.

III. ASSESSING CONTENTIONS OF INFRINGEMENT

A. Following a contention of infringement, officials should follow specific procedures for the assessment of such contention in accord with the following practices. No finding of infringement should be made absent compliance with such procedures.

B. Any assessment (hereinafter "first-instance decision") of a contention of infringement should be made by an independent official or officials, personally identified to the parties.

1. "Independent" in this context means (1) having no prior role in the investigation or in formulating the contention of infringement (except as a neutral decision maker regarding interim or preliminary matters required for management of prior

proceedings, as provided by law); (2) having no specific personal interest in the matter or material relationship to any party; and (3) having sufficient expertise in the law and economics of competition and/or other relevant disciplines to conduct the proceeding and to make the assessment in a disinterested, efficient and accurate manner.

C. The decision-making officials should compile a record whose contents are clearly ascertainable by respondents and any reviewing authorities (subject to proportional limitations to protect specific and reasonable confidentiality concerns). Officials should provide specific and enforceable means to exclude from the record all extraneous matter. Off-the-record communications with decision-making officials by the parties or their counsel or other agents or representatives should be prohibited throughout proceedings.

D. Counsel for respondents should be permitted to introduce all relevant evidence, argument and expert analysis on all material issues (subject to reasonable administration of proceedings—*e.g.*, limits on merely cumulative evidence, reasonable requirements as to timeliness and/or sequence of submission).

E. All evidence, arguments and expert analysis placed in the record should be subject to challenge on the basis of authenticity, relevance, materiality and/or other potentially significant aspects. All documentary and testimonial evidence, argument and analysis should be subject to challenge by means tailored to provide tests of credibility, completeness and weight.

1. Allowing counsel for parties to challenge inculpatory or opposing testimony by live cross-examination should be permitted to the extent feasible. In legal systems that do not present this opportunity, as in some administrative, inquisitorial and/or civil-law systems, other equivalent means for testing the quality and credibility of such testimony should be made available, such as questioning of witnesses by the independent decision maker sua sponte or upon request of the parties.

F. Presentation of or challenges to evidence, arguments and expert analysis should be made in the presence of the first-instance decision-making official(s).

1. For reasons of efficiency, certain procedural stages may call for written submissions by counsel, such as briefing of a request for summary disposition, a request for narrowing of the issues, or upon final submission of the matter for decision. Where submissions are made in writing, counsel for respondents should have the opportunity for oral presentation of argument before the decision maker(s).

IV. FIRST-INSTANCE DECISION

A. Any assessment of infringement should be based only on matters of record as to which targets and their counsel have had full opportunity to respond. The assessment should be in writing, explaining reasons for the assessment of evidence on each issue and the economic, factual and legal analysis relied upon.

B. A finding of infringement should include a clear explanation of the evidence and the legal and economic theories and analyses that support it. The specification of remedy should be written and should explain why each element of the remedy is required by, and tailored to, the characteristics of the infringement.

V. REVIEW

A. First-instance decisions should be subject to review by an independent tribunal.

1. "Independent" in this context means (1) having no prior role in the investigation, accusation, or first-instance proceeding (except as a neutral decision maker regarding interim or preliminary matters required for management of first-instance proceedings, as provided by law); (2) having no specific personal interest in the matter or material relationship to any party; and (3) having sufficient expertise in the law and economics of competition and/or other relevant disciplines to review the first-instance decision in a disinterested, efficient and accurate manner.

2. "Tribunal" in this context means one or more named officials specifically designated to conduct the review and render decision and personally identified to counsel for the parties.

B. Counsel for the parties should be permitted to address the tribunal directly in face-to-face proceedings and through written submissions.

1. The opportunity for face-to-face proceedings should be subject to the discretion of the independent tribunal to forego such proceedings where they are highly unlikely to affect the outcome of or basis for the decision on review, in which case the tribunal should consider the parties' written submissions.

C. Review should be permitted on any issue unless sound policy suggests deference to the first-instance tribunal (*e.g.*, basic fact-finding, routine evidentiary and procedural rulings, assessments of witness credibility and the like).

1. Many basic facts are usually not appropriate for review on the merits, such as whether particular individuals participated in particular communications (cartel cases) or whether particular distributors traded in specific goods (exclusionary conduct cases). By contrast, competition proceedings frequently involve the drawing of inferences (*e.g.*, the existence of conspiracy; whether a practice should be regarded as exclusionary) that implicate important economic and/or competition policy aspects (such as the probability and consequences of mistaken inferences) or otherwise intertwine fact, economic analysis, law and/or policy. Review should be permitted on such issues.

D. The basis for decision should be confined to matters addressed in the record in the first-instance proceeding (subject to reasonable exceptions for post-decision changes in law or fact and incontestable public-record facts).

E. The decision on review should be in writing and explain in detail the assessment of and conclusions upon all issues underlying the decision.

VI. BEST PRACTICES APPLICABLE TO ALL PHASES OF ANTITRUST PROCEEDINGS

A. Officials involved in all steps of an antitrust proceeding should possess sufficient expertise in competition law, economics and/or other relevant disciplines to enable them to conduct their duties in a disinterested, efficient and accurate fashion.

B. All rules and practices governing proceedings—procedure, evidence, review, *etc.*—should be clearly disclosed and made publicly accessible in advance of proceedings. Any exceptions should be proportional and based on specifically identified objective and legitimate reasons.

C. Officials should provide for an effective system to prevent unnecessary delay at any stage in proceedings.