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Affected volume of commerce: how the concept is interpreted to calculate cartel fines in the United States and in Brazil

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RESUMO

Multas por violações concorrenciais –e cartéis em especial– são frequentemente mencionadas nas listas de maiores multas sobre empresas de todos os tempos. Este estudo é dividido em duas partes. Na primeira discute-se como os tribunais dos EUA têm interpretado o “volume de comércio” afetado e o que deve ser usado como valor base da multa. Na segunda parte discute-se brevemente a lei no Brasil e o que entendemos deve ser alterado de forma que o Brasil fique em linha com outras jurisdições relevantes no que toca a melhores práticas quanto a multas sobre violadores de normas sobre cartéis.

Palavras-chave: Antitruste; Concorrência; CADE; Cartel; Multa; Volume de Comércio.

ABSTRACT

Fines for antitrust violations – and cartel infringements in particular – are frequently mentioned in the lists of largest corporate fines of all times. This paper is divided in two parts. In the first one it discusses how the US courts have interpreted the affected “volume of commerce” and what should be used for that base level of the fine. In the second part it briefly addresses the law in Brazil and what we consider needs to be changed so that Brazil becomes aligned with the other major jurisdictions when it comes to best practices in fining wrongdoers for cartel violations.

Keywords: Anti-trust; Competition; CADE; Cartel; Fine; Volume of Commerce.

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SUMMARY: Introduction; Part 1 – United States; I. Statutory and regulatory provisions in the United States; II. Determination of sales really affected by the conspiracy; III. What constitutes domestic commerce? Can indirect sales be considered?; IV. Total-price versus component-only volume of commerce; Part 2 – Brazil; Conclusion.

Introduction

Fines for antitrust violations – and cartel infringements in particular – are frequently mentioned in the lists of largest corporate fines of all times². In May 1999, the U.S. Department of Justice (“DOJ”) imposed a fine of USD 500 million against F. Hoffmann-La Roche for its participation in the vitamin cartel, at that point the largest fine ever imposed in a criminal prosecution of any kind in the U.S.³ ⁴ This amount was matched on September 20, 2012, when AU Optronics was sentenced to pay a USD 500 million fine for the participation in a conspiracy to fix the price of TFT-LCD panels⁵.

In Europe, the fines imposed by the European Commission for cartel practices are even higher. On 5 December 2012, the European Commission imposed its largest ever fine in the same investigation (€1.47 billion) on seven international producers of cathode ray tubes (“CRTs”) for their involvement in a cartel over a period of 10 years⁶. The largest individual fine for a cartel practice in the EU was the one imposed on Saint Gobain in 2008 for its involvement in the carglass cartel⁷.

The situation is no different in Brazil, which has become a very active enforcer following the lead of the two main antitrust jurisdictions. In September 2010, the Brazilian competition agency (*Conselho Administrativo de Defesa Econômica* – “CADE”) sentenced producers of industrial and medical gases to pay a total fine of BRL 3 billion (approximately USD 1 billion)

² *Kaplan's Top Ten Corporate Criminal Fines*, The FCPA Blog (January 4, 2013), available at <http://www.fcpcbog.com/blog/2013/1/4/kaplans-top-ten-corporate-criminal-fines.html>.

³ Scott D. Hammond, Dep. Ass't Att'y Gen., Antitrust Div., A Summary Overview of the Antitrust Division's Criminal Enforcement Program, New York State Bar Annual Meeting, (Jan. 23, 2003), available at <http://www.justice.gov/atr/public/speeches/200686.htm>.

⁴ *Fighting Cartels – why and how*, Konkurrensverket Swedish Competition Authority at 30 (2001), available at <http://www.kkv.se/globalassets/english/publications-and-decisions/fighting-cartels.pdf>.

⁵ *Antitrust Division 2013 Criminal Enforcement Update*, DOJ, available at <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.

⁶ See Caroline Hobson et al., *European Commission imposes largest ever antitrust fine*, LEXOLOGY (December 7 2012), available at <http://www.lexology.com/library/detail.aspx?g=e8fdc9b9-54af-4516-af70-3ba129e800c7>.

⁷ For a list of the ten largest fines imposed by the Commission in cartel cases, see <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

for their involvement in the so-called oxygen cartel⁸. This fine was later reduced by CADE for an amount of approximately BRL 2.3 billion⁹.

The substantial amounts of the fines observed in these three jurisdictions raise a philosophical question of whether antitrust violations – and cartel infringements in particular – are of so serious nature to require such heavy punishments. Cartel violations certainly have the potential of harming millions of consumers, and this may be enough of an argument for the large fines. But we do not need to engage in this arid subject, since it is not the object of the paper.

What perhaps can be said is that fines for cartel practices are frequently high because they are based on the revenues of the wrongdoers, commonly multinational corporations with billions in billings and presence in different continents. More specifically, the fines in different jurisdictions are frequently based on what the U.S. law calls the “volume of commerce” affected by the violation. According to former Antitrust Division’s Deputy Assistant Attorney General for Criminal Enforcement, Scott Hammond, “there are few issues in the area of antitrust criminal remedies more firmly settled than that volume of commerce is the most appropriate method of distinguishing the severity of criminal antitrust violations.”¹⁰ However, even in the US where the concept has long existed, there is little guidance in relation to key issues¹¹. Brazil, on the other hand, is still very behind in relation to the matter, and the current regulations still seem not to capture what it means to have an antitrust fine based on the amount of commerce affected by the infringement.

This paper is divided in two parts. In the first one we discuss how the US courts have interpreted the affected “volume of commerce” and what should be used for that base level of the fine. In the second part we provide a brief note addressing the law in Brazil and what we consider needs to be changed so that Brazil becomes aligned with the other major jurisdictions when it comes to best practices in fining wrongdoers for cartel violations.

PART 1 – UNITED STATES

⁸*Cade impõe multa recorde de R\$ 3 bi em caso de cartel de gases industriais*, G1 (September 1st 2010), available at <http://g1.globo.com/economia-e-negocios/noticia/2010/09/cade-impoe-multa-recorde-em-caso-de-cartel-de-gases-industriais2.html>.

⁹*Empresas de gás acusadas de cartel reduzem multa no Cade*, Folha de São Paulo (September 9 2010), available at <http://www1.folha.uol.com.br/mercado/2010/09/802884-empresas-de-gas-acusadas-de-cartel-reduzem-multa-no-cade.shtml>.

¹⁰ Scott D. Hammond, Dep. Ass’t Att’y Gen., Antitrust Div., Antitrust Modernization Commission Hearings on Criminal Remedies at 6 (Nov. 3, 2005).

¹¹ James Mutchnik et al., *The Volume of Commerce Enigma*, THE ANTITRUST SOURCE. 1 (June 2008).

I. Statutory and regulatory provisions in the United States

Section 1 of the Sherman Act prohibits contracts, combinations or conspiracies that restrain trade or commerce. Violations to that provision may subject corporations to penalties up to USD 100 million¹². When seeking higher fines, however, the DOJ and courts frequently use the alternative fine based on gain or loss caused by the violation, as established by 18 U.S.C. 3571¹³. This alternative fine often exceeds the USD 100 million statutory maximum of the Sherman Act.

The statutes, however, do not prescribe the mechanism for calculating the fine. For that purpose courts use the United States Sentencing Guidelines (“USSG”). The fine calculation involves a number of steps. First, the court should determine the “base fine”. After that, the court calculates the culpability score of the violator to establish the minimum and maximum multipliers¹⁴. A fine range is therefore determined by multiplying the base fine by the multipliers¹⁵. A number of factors will determine where in this fine range the court will set the precise amount of fine and whether or not some cooperation discount will be granted.

As a rule, the base fine for corporations is determined by Section 8C2.4 of the USSG. However, Section 2R1.1 provides special instructions for the calculation of the base fine in case of hardcore cartel violations (bid-rigging, price-fixing or market-allocation), which shall correspond to 20% of the volume of affected commerce. Nevertheless, the USSG do not offer detailed explanation of how to calculate the volume of commerce, stating only that “the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation.”¹⁶

The concept of volume of commerce gives rise to numerous debates. In addition to the vagueness of the USSG’s definition, one can add the lack of guidance given by the DOJ on that matter, especially because the Division can be very casuistic when managing the concept in light of the peculiarities of each case. In addition, volume of commerce is not an extensively litigated concept, because investigated parties very often prefer to settle cartel cases instead of

¹² 15 U.S.C.A. § 1 (2004).

¹³ “[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.” 18 U.S.C. § 3571(d)

¹⁴ USSG 8C2.5

¹⁵ USSG 8C2.7.

¹⁶ USSG 2R1.1.

going to trial with the risk of facing huge criminal fines. When the concept is litigated in courts, the holdings are often inconsistent.

It is worth noting that the mandatory USSG system changed in 2005, after the US Supreme Court decision in *United States v. Booker*¹⁷. In this case, the Court held that the USSG are to be used by courts in an advisory, rather than mandatory, manner. Therefore, the imposition of a Guidelines sentence range is no longer mandatory and the DOJ must be able to prove volume of affected commerce under 2R1.1 to a judge by preponderance of evidence. Despite the decision in *Booker*, the Antitrust Division has already stated that it remains the policy to “seek Guidelines sentences because they have promoted consistency, fairness, and transparency in sentencing.”¹⁸ In light of that, the study of the controversies that the concept of volume of commerce gives rise to continues to be of extreme importance in the antitrust realm.

Below we will address separately some of the debates that are considered to be the most relevant for the determination of what constitutes volume of commerce in the US. These issues involve: (i) determination of sales really affected by the conspiracy; (ii) what constitutes domestic commerce and whether indirect sales can be accounted; and (iii) total-price versus component-only volume of commerce.

II. Determination of sales really affected by the conspiracy

As mentioned above, the USSG set that the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him in goods or services that were affected by the violation. Although at first glance it seems a pretty objective criterion, this language may originate different interpretations. More specifically, should we consider all sales of the relevant product during the period of the conspiracy as affected thereby or should we engage in a more detailed analysis to identify what transactions were really affected by the collusion?

The arguments at one side of the scale clearly favor a more pragmatic and transparent assessment. However, if one considers all sales during the period of the conspiracy as affected, this may result in unfair results in some cases. It is easy to imagine a situation where a defendant participates in a price-fixing conspiracy and makes 50% of sales at competitive prices and the

¹⁷ *United States v. Booker*, 543 U.S. 220 (2005).

¹⁸ Scott D. Hammond, Dep. Ass't Att'y Gen., Antitrust Div., Antitrust Sentencing in the Post-*Booker* Era: Risks Remain High For Non-Cooperating Defendants at 6, American Bar Association Section of Antitrust Law Spring Meeting (March 30, 2005).

other 50% at agreed upon prices. If the court considers all sales in the defendant's volume of commerce, it can lead to a disproportionately high fine. Needless to say, this is obviously the position that the DOJ favors, not only because it makes the job easier, but also because the DOJ is understandably biased in the pursuit of higher fines. On the other hand, if one were to determine in a very specific manner which sales were really affected, this could avoid unfair results in some cases, but would substantially increase the work for the determination of the volume of affected commerce. In addition to being time consuming, there are no guarantees that this approach would solve the problem, since there can be many instances where it is simply not possible to determine with precision if and to what extent a given sale was affected by a conspiracy.

The issue here is certainly a close call and has been litigated only a few times. Courts have adopted varied understandings but have not allowed the DOJ a total control in calculating the volume of commerce.

In *United States v. Hayter Oil*, the Sixth Circuit held that commerce affected by the price-fixing violation involves the total sales “during the period of conspiracy, without regard to whether individual sales were made at the target price.”¹⁹ This is certainly a position highly favorable to the Government. In the example mentioned above where only half of the sales was affected by the violation, 100% of them would be considered for the calculation of the volume of commerce under *Hayter Oil*. This decision was criticized by a number of commentators for being over inclusive²⁰.

In *United States v. SKW Metals & Alloys, Inc.*²¹, the Second Circuit disagreed with the Sixth Circuit and held that only sales made above the market level (whether or not at or above the conspirators' fixed price) could legitimately be included in the volume of commerce²². According to the Second Circuit, “if during the course of the conspiracy there [are] intervals when the illegal [price-fixing] agreement [is] ineffectual and [has] no effect or influence on prices, then sales in those intervals are not 'affected by' the illegal [price-fixing] agreement and

¹⁹ *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1273 (6th Cir. 1995).

²⁰ See, e.g., Henry D. Fincher, *Fining The Market: The Bumbling Price-Fixer and the Antitrust Guideline*, 8 FED. SENT. R. 244 (1996); Anne Marie Herron, *The Antitrust Sentencing Guideline: Deterring Crime by Clarifying the Volume of Commerce Muddle*, 51 EMORY L.J. 929, 945–48 (2002).

²¹ *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83 (2nd Cir. 1999).

²² See Scott Wu, *U.S. antitrust fines for price-fixing: understanding Volume of Commerce*, LEXOLOGY (December 31 2014).

should be excluded from the volume of commerce.”²³ This position is more favorable to the defendants.

Finally, in *United States v. Andreas*²⁴, the Seventh Circuit adopted a more intermediary view, although more aligned with the position of the Second Circuit than with the one of the Sixth Circuit. The *Andreas* court ruled that “sales that were entirely unaffected did not harm consumers and therefore should not be counted for sentencing because they would not reflect the scale or scope of the offense.”²⁵ However, the Seventh Circuit allowed a rebuttable presumption that defendant’s sales made during the conspiracy period have been influenced by the price-fixing conspiracy. In that sense, once the defendant presents sufficient evidence to the contrary, the burden of proof falls on the DOJ to show the conspiracy’s influence on prices²⁶.

Among the three positions, we believe that the holding in *Andreas* seems to be the most reasonable. As mentioned above, there is a constant tension here between objectiveness and transparency, on one side, and fairness and proportionality, on the other. To simply assume that all sales of the relevant product during the conspiracy period were affected seems extreme and may result in very disproportional outcomes. On the other hand, to require the DOJ to engage in a super detailed analysis to identify the sales really affected can be highly troublesome, time consuming and may not be even doable. In light of this, the solution of allowing a rebuttable presumption that defendant’s sales made during the conspiracy period were influenced by the conspiracy seems to be a reasonable outcome that gives proper weight to the arguments on both sides. If the defendant presents sufficient evidence showing that certain sales were not affected by the conspiracy for any reason, the Government will hold the ultimate burden of showing that they actually were.

And what about the sales after the conspiracy ended which might have been affected by the conspiracy?

There is wrinkle in relation to this matter which relates to sales occurred after the conspiracy ended, but which may have had prices set as a result of the conspiracy. Should these sales be taken into account when determining the volume of affected commerce?

Evidently, the most frequent position of the DOJ is that, if it is possible to find that the conspiracy impacted prices of sales occurred after the cartel meetings ended, these amounts

²³ *SKW Metals*, 195 F.3d., at 91.

²⁴ *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000).

²⁵ *Andreas*, 216 F.3d, at 677-78.

²⁶ *Wu supra*. at 3.

must be taken into account²⁷. We have found no case law addressing the matter, which leave us with little guidance. The issue deserves a careful evaluation and the best solution seems to be that the DOJ holds the burden of showing that the sales were actually affected.

It may occur that one of the cartel members totally leaves the conspiracy at some point, but sales that happen later (after the withdrawal) may have prices determined by arrangements had when the price fixing was still in place. It is worth mentioning here that the conduct prohibited by the Sherman Act is to engage in combinations or conspiracies to restrain trade or commerce. Once the cartel member leaves the conspiracy, it is not violating the law anymore. On the other hand, there is an argument that, if the prices of sales that occurred only later were determined by and set when the conspiracy was still in place, these billings constitute commerce affected by the conspiracy.

In our view, a reasonable solution here is to afford the DOJ with the burden of proving that these sales were affected by the antitrust violation. Once a company leaves a price-fixing arrangement, it is not under the monitoring of the other cartelists anymore and there may be different factors that can influence the price of the good or service, especially if the sale is made only later. In view of that, once the party leaves the conspiracy, it should be presumed that the sales occurred after that event are no longer affected by the violation. If, however, the DOJ is able to demonstrate that the sales were indeed directly affected by the violation, and that no supervening circumstance stepped in to change the course of things, the DOJ will have very strong grounds to sustain that these billings should be taken into account for determining the volume of commerce.

III. What constitutes domestic commerce? Can indirect sales be considered?

The process to establish the volume of commerce of the defendant does not end with the determination of which sales were affected by the violation. The court also needs to determine which sales fall within the territorial or extraterritorial jurisdiction of the US antitrust laws. In different occasions the DOJ has suggested that it is its policy to “consider only a defendant’s domestic sales in calculating a defendant’s volume of affected commerce.”²⁸ However, as some commentators point out “the Antitrust Division has otherwise not previously given ‘clear,

²⁷ U.S.’ Reply to Defendants Sentencing Memoranda. *In United States v. Au Optronics Coporation*. Filed on September 19, 2012. Page 12.

²⁸ Scott D. Hammond, *Charting New Waters in International Cartel Prosecutions* 14-15 n.28 (Mar. 2, 2006).

generally applicable guidance’ regarding what commerce the Division will include as affected commerce.”²⁹ In that sense, there has been some controversy not only as to what exactly constitutes domestic commerce, but also as to the extent to which the DOJ could consider foreign or indirect commerce to calculate volume of commerce.

What is domestic commerce?

In today’s world, it is not rare to see corporations engaging in international transactions and somehow touching upon the territory of certain countries without really impacting on consumers of that territory. As commentators have pointed out, “potentially relevant factors may include: (1) location of, and relationships between, the manufacturing and sales arms of the defendant; (2) location of, and relationships between, the purchasing and end-user branches of the buyer; (3) location of the invoiced entity; (4) location of the bank accounts to and from which money is transferred in the transaction; (5) location of contract negotiations and signing; and (6) physical transfer of the product, including entry of the product into the United States. The relative weight, if any, of these factors has never been articulated by the Division.”³⁰ The positions taken by the DOJ in different cases show a very case-specific analysis of the matter. A more clear guidance from the DOJ is evidently in need. If this is not possible, the DOJ should at least acknowledge this fact.

In 1982 Congress passed the Foreign Trade Antitrust Improvements Act (“FTAIA”), which defines the jurisdictional boundaries of the Sherman Act in cases involving international trade or commerce³¹. *F. Hoffman-La Roche Ltda. v. Empagran*³² was the landmark US Supreme Court decision that interpreted the FTAIA and set the jurisdictional reach of the Sherman Act in cases of international cartels. In the case the Court explained that “[t]he FTAIA seeks to

²⁹ Brandon W. Duke, *The Indirect Bump: Indirect Commerce and Corporate Cartel Plea Agreements*, WINSTON & STRAWN, 2-3 (2013).

³⁰ James Mutchnik et al. *supra*. at 5.

³¹ 15 U.S.C. 6a: “Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.”

³² *F. Hoffman-La Roche Ltd. V. Empagran S.A.*, 542 U.S. 155 (2004).

make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets.”³³

One of the main concerns of the Supreme Court in *Empagran* was the concept of comity. According to the Court, “[n]o one denies that America’s antitrust laws, when applied to foreign conduct, can interfere with a foreign nation’s ability independently to regulate its own commercial affairs.”³⁴ Such interference, the Court explained, could be justified to the extent that foreign anticompetitive conduct causes domestic injury.³⁵ But absent that domestic injury, the Sherman Act should not be construed to cover solely foreign injuries³⁶. This conclusion makes even more sense when we observe other jurisdictions (such as the EU, Canada and Brazil) increasing their enforcement against international cartels. If one takes into account commerce that does not really affect the US but rather other countries, “defendants run the risk of paying portions of multiple fines that are based on the same underlying sales.”³⁷ The *Empagran* case, it is true, was a civil case. But as long as it stands for the principle that the Sherman Act does not reach conduct with any substantial effect in the US, it should equally apply in the criminal context.

In different cases issues have arisen involving what constitutes domestic commerce and whether the DOJ can account for foreign sales. In 2008, the DOJ executed a plea agreement with Qantas in the context of the Air Cargo investigation. Under the agreement, “[t]he volume of affected commerce [\$244.4 million] does not include commerce related to the defendant’s cargo shipments on routes into the United States.”³⁸ The position advocated by Qantas was that only U.S. outbound shipments should be considered, and not shipments into the US. Although ultimately accepting the defendant’s suggested base fine, the DOJ did not exactly agree with the conclusion that shipments into the US would not harm US victims. Rather, it decided to accept Qantas position because of the “complexity of litigating the issues”.

Although not absolutely clear, it seems that the DOJ considered the outbound shipments something similar to the concept of domestic commerce, more closely within the DOJ’s jurisdictional reach, whereas the inbound shipments were similar to foreign commerce.

³³ *Empagran*, 542 U.S. at 161.

³⁴ *Empagran*, 542 U.S. at 165.

³⁵ *Empagran*, 542 U.S. at 165.

³⁶ *Empagran*, 542 U.S. at 165.

³⁷ James Mutchnik et al. *supra*. at 8.

³⁸ Plea Agreement at 7, *United States v. Qantas Airways Ltd.*, No. 07-322 (D.D.C. Jan. 14, 2008).

However, despite not including the in-bound shipments in the volume of affected commerce, the DOJ treated them as an “aggravating factor” that demanded an upward adjustment of the base fine³⁹.

Agreeing with authors who have written about the matter, we believe that the best test here should focus on the location of the end-users. This approach seems to be the most aligned with the FTAIA and comity considerations⁴⁰. On the other hand, transactions that touch the United States only in a nominal way should not be considered affected domestic commerce. This applies for example when the invoiced entity is located in the US – or when the contract is signed in the US, or even when the product touches the US soil to be stored – but the end-user of the product is foreign. In that case, we believe, the sale should be treated as foreign sale and not included in the volume of affected commerce.

As highlighted by the same authors, it is possible to find Division precedent going towards the direction here defended. “For example, in 2005, in the DRAM cases, the Division consistently agreed to calculate defendants’ VOC by aggregating sales to original equipment manufacturers (OEMs) actually located and taking delivery in the United States. Similarly, during the *Hydrogen Peroxide* investigation in 2006, the Division based VOC on sales within the United States.”⁴¹ (internal citations omitted).

Can indirect sales be considered?

This discussion occurred in the negotiation of a plea agreement between the Antitrust Division and Furukawa Electric Company⁴², in the context of the auto parts cartel investigation⁴³.

As explained by the DOJ at the sentencing hearing, Furukawa had “three categories of commerce for the automotive parts industry. The first category included products ‘manufactured in the United States, sold in the United States to automakers here in the U.S. who are installing these parts into their cars.’ ... The second category of commerce included products ‘that were manufactured abroad . . . [and] were then sold into the United States and installed in cars here in the U.S.’ ... The third category of commerce, which the government noted was ‘a little more complicated,’ included products which were ‘manufactured abroad,

³⁹ Scott D. Hammond, Sentencing Issues in Today’s Global Economy, Speech Before the ABA Section of Antitrust Law (Mar. 26, 2008).

⁴⁰ James Mutchnik et al. *supra*. at 9.

⁴¹ James Mutchnik et al. *supra*. at 8

⁴² *United States v. Furukawa Elec. Co. Ltd.*, No. 11-cr-20612 (E.D. Mich. Nov. 14, 2011).

⁴³ Press Release, U.S. Dept. of Justice, Furukawa Electric Co. Ltd. and Three Executives Agree to Plead Guilty to Automobile Parts Price-Fixing and Bid-Rigging Conspiracy (Sept. 29, 2011).

[then] sold to automakers abroad, [and] installed in cars abroad that are ultimately destined for the U.S. and U.S. consumers.’ This third category is a clear example of indirect commerce. The government explained that the Antitrust Division’s view is that it could have included indirect commerce as affected commerce in the overall calculation, but it did not do so in calculating Furukawa’s fine.”⁴⁴ (internal citations omitted).

Although not including the indirect commerce in the volume of affected commerce calculation, the DOJ used this third category as an upward adjustment to the guidelines fine. As Scott Hammond explained, the DOJ “took [indirect commerce] into account when determining a starting point for the cooperation discount for the defendants who negotiated pleas with the DOJ.”⁴⁵

As already indicated, we agree with the general policy of the DOJ of considering only domestic commerce for purposes of the calculation of the affected volume of commerce, leaving outside billings that (i) although on the edge, look more like foreign commerce (like in the Qantas case); or (ii) refer to indirect commerce (like in the Furukawa case). Whether or not such elements should be weighted in a subsequent step of the fine calculation, as an aggravating factor, is something outside of the scope of this paper. If the reader allows a quick note, however, we recognize the soundness of the DOJ policy of trying to include somewhere in the fine calculation elements that, although not part of the volume of affected commerce, have the potential of affecting US customers.

Our discomfort with the above described positions is less related to the aim of the DOJ of taking indirect sales into account somehow and more related to the ad-hoc approach that the DOJ seems to confer to these cases. The solution in the plea agreement with Qantas seems shaped to address the peculiarities of the Air Cargo case, and not to serve as general guidance. The same way, the outcome in the plea agreement with Furukawa seems a resolution that can be used for other auto parts cases, but perhaps for few others. In light of that, we see two alternatives. The first and harder one would be that the DOJ provides a more generally applicable guidance on the subject. The second would be that, if unable to provide such guidance, the DOJ recognizes this circumstance. If on one hand this can be seen as compromising the transparency that the DOJ likes to convey to the fining procedure, on the

⁴⁴ Brandon W. Duke, *supra.* at 4 -5.

⁴⁵ Scott D. Hammond, Remarks at the ABA/IBA International Cartel Workshop, GCR Cartel Roundtable, Global Competition Review 18 (Feb. 2012).

other hand it at least gives the defendants a proper notice that they may be faced with uncertain uses of foreign commerce or indirect sales in the calculation of the potential fines.

IV. Total-price versus component-only volume of commerce

As mentioned above, section 2R1.1 of the USSG says that the base fine is centered on the volume of commerce *affected by the violation*. Throughout the years defense counsel has tried to argue that the sentence should be based not on the total price of the product object of the conspiracy, but only the amount of commerce for which the illegal activity raised prices to consumers⁴⁶. For example, if the competitive price of the product is USD 10 and the cartelists agreed to charge USD 12, the base fine should be based on the USD 2 overcharge only. Obviously, the position of the DOJ is that the appropriate volume of commerce is a total price definition and we agree with that. Although being a possible interpretation of the plain language of the USSG, it is hard to imagine that it was the intent of the drafters of the USSG that only the overcharge agreed on between the conspirators should serve as basis for the fine calculation. This could certainly result in an under penalization of the wrongdoers and put in danger the antitrust enforcement against cartels.

A different situation, however, exists when the price of a product or service is made up of several components and the conspirators agreed to fix only one of them. The air cargo fuel surcharge is a good example of this legal dispute. In early 2000, cargo companies started adding fuel surcharges using an index of spot prices and charged consumers by the weight of goods shipped, regardless of the distance the goods were carried⁴⁷. The fuel surcharge bore no proportional relationship to the amount of fuel consumed during shipping⁴⁸. The surcharge was subject to price fixing, but not other components of the price for shipping air cargo.

In the negotiation of plea agreements, the defendants' position was that the volume of commerce should be based on the value of the fuel surcharge only, since it would reflect consumer's actual injury for the increased price. Defendants continued competing on other components of the air cargo price. Naturally, the DOJ position was that a total price definition was required and all volume of commerce for air cargo shipping should be considered.

⁴⁶ Melissa Maxman & Elizabeth Holdefer, *Volume of Commerce and Criminal Sentences for Antitrust Violations – Alternative Interpretations in the Air Cargo Fuel Surcharge Cases*, THE ANTITRUST SOURCE. 1 (August 2011).

⁴⁷ Maxman & Holdefer, *supra*. at 2-3.

⁴⁸ See Dustin Appel, *Comment: Air Cargo Fuel Surcharges and Tacit Collusion Under the Sherman Act: What Good Is Catching a Few Bad Guys If Consumers Still Get Robbed?*, 73 J. AIR L. & COMM. 375, 392–402 (2008).

In a case such as the air cargo described above, we understand that the most reasonable understanding would be to consider the component-only volume of commerce. The reasons seem logical. If the price of a good is made of two perfectly identifiable components and competitors are agreeing on one of them and openly competing on the other, if the commerce related to the later is taken into consideration, defendants would be fined on the basis of commerce where no violation is taking place. Defendants would be punished for legal activity.

Despite the apparent soundness of this argument, it appears that there has been no case law on the matter. Because the alternatives to a plea agreement risk consequences even less desirable than a higher volume of commerce, defendants have little incentive to challenge the Division's formulation⁴⁹. As we mentioned above, one of the positions taken by the DOJ in the air cargo case was that the volume of commerce would include only outbound (and not inbound) shipments. If defendants took the case to courts, the DOJ would be willing to challenge not only the component-only aspect, but other aspects such as the inbound/outbound factor, which could be harmful to defendants.

PART 2 – BRAZIL

Law No. 12.529/2011 (the “2011 Competition Act”) replaced Law No. 8.884/1994 (“former Competition Act”) and restructured the antitrust system in Brazil.

Under article 23 of the former Competition Act, antitrust violations could subject the wrongdoer to a fine of 1% to 30% of the gross revenues registered by the company in the year before the initiation of the investigation. When applying this provision, CADE adopted varying understandings, sometimes considering the entire revenues of the defendant and sometimes limiting the base fine to revenues registered only in the field of business where the violation occurred. Because of the lack of consistency, both the language of the statute and CADE's interpretation thereof gave rise to much censure from commentators⁵⁰.

Sensitive to the criticism, the 2011 Competition Act tried to establish a closer link between the antitrust fine and the amount of commerce affected by the infringement and its article 37 says that antitrust violations may subject violators to fines of 0.1% to 20% of the

⁴⁹ Maxman & Holdefer, *supra*. at 1.

⁵⁰ See Alberto Afonso Monteiro. *Settlements in Cartel Cases: Recent Developments and Proposals for Improvement*, p. 17. Available at: http://www.veirano.com.br/upload/content_attachments/95/Compromisso_de_cessacao_em_casos_de_cartel_avancos_recentes_e_propostas_de_aperfeicoamento_2013_original.pdf.

annual gross revenues registered by the company in the year before the initiation of the investigation, in the *field of business* where the violation occurred.

As commentators point out, the field of business test it is “undoubtedly one of the most controversial issues regarding setting fines and negotiating settlements in Brazil nowadays. Some hold that this legal concept should be interpreted to encompass only the products and services affected by the conducts under investigation or the relevant markets affected, while others, including the authorities, defend a broader interpretation to include other products and services that may be considered part of the same activity”.⁵¹

Although the language of the field of business affected by the violation represented a good attempt towards the best practices, we believe that the solution adopted by the Brazilian system is still insufficient. The reason is that in 2012 CADE enacted a regulation (“Resolution No. 3/2012”) with a tentative exhaustive list of “fields of business”, based on the National Classification of Economic Activities – CNAE. The CNAE is derived from on the International Standard Industrial Classification of All Economic Activities – ISIC of the United Nations.

The problem with the categories of Resolution No. 3/2012 is that they tend to be either under inclusive or – more frequently – over inclusive, encompassing more than the goods or services affected by the violation. As a result, there is a risk that billings not related in any way to the violation be considered for purposes of the fine calculation, leading to disproportional outcomes.

This problem was identified and overcome by CADE (not without some interpretative easing) in the context of the settlement agreement executed with Air France and KLM in the context of the air cargo cartel⁵². In this case, for proportionality reasons, CADE reduced the percentage applied over the base fine because the revenues obtained with air cargo shipments (the object of the cartel) represented only 10% of the revenues of the defendants in the field of business No. 103 of Resolution No. 3/2012 (which encompasses transport of cargo and people).

This episode is clear in the following passage of the decision: “Despite the field of air transport encompass the transport of passengers and cargo (field of business No. 103 of Resolution No. 3/2012), one can observe here a violation occurred in an activity which is subsidiary to the main activity, this one being the transport of passengers. Therefore, I understand that the organization, hierarchy and proportion of the activities should be observed

⁵¹ Leonardo Duarte & Rodrigo Santos, *Cartel Settlements in Brazil: Recent Developments and Upcoming Challenges*, OVERVIEW OF COMPETITION LAW IN BRAZIL. Available at: http://www.veirano.com.br/upload/content_attachments/216/Veirano_Settlements_Overview_Competition_Law_Brazil_original.pdf.

⁵² CADE, Requirement 08700.010220/2012-16 in the Administrative Proceeding 08012.011027/2006-02.

in the definition of the fine in this case ... I consider that the revenues with the cargo transportation can be considered as reference for the definition of the fine in this case, since there are reasonable arguments supporting the limitation of the impacts of the violation to this specific activity.”⁵³

Adopting the same understanding, in the settlements executed in ambulances tender cartel cases⁵⁴, CADE established that it would not be proportional to determine the fine taking into account the total revenues in the relevant field of business of CADE Resolution No. 3/2012. In that sense, CADE considered the amount of the contract related to the tender, bearing in mind that the investigation related only to one bidding process. As Leonardo Duarte and Rodrigo Santos point out, “a similar understanding was also applied by CADE in the settlement agreement signed in the investigation of cartel in tenders for providing laundry services to public hospitals in the State of Rio de Janeiro⁵⁵, in which CADE’s Tribunal has also applied a more flexible approach for proportionality reasons.”⁵⁶

It is possible to notice that there is still uncertainty as to how to apply the field of business test when calculating fine amounts. This can have the objectionable consequence of fines that are disproportional to the potential effects that may have been caused by the conducts under investigation⁵⁷.

We understand that the best answer would be to interpret the legal concept of field of business as the product(s) or service(s) potentially affected by the conduct under investigation, following the best international practices on this matter⁵⁸. As extensively addressed above, in the US the USSG determines that the volume of affected commerce is to be considered for purposes of defining the base fine. Similarly, in the EU, under the Commission Guidelines on fines⁵⁹, the fines for antitrust violations should be based on the “value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates” in the relevant geographic area of the EEA.

Of course that, once adopting an understanding similar to the one followed in the EU or the US, Brazil will probably start to face the same controversies regarding the definition of affected

⁵³ Pages 10-11 of the vote of the Reporting Commissioner Ricardo Ruiz (Requirement 08700.010220/2012-16).

⁵⁴ CADE, Administrative Proceeding No. 08012.003931/2005-58.

⁵⁵ CADE, Administrative Proceeding No. 08012.008850/2008-94.

⁵⁶ Leonardo Duarte & Rodrigo Santos, *supra*, at 304.

⁵⁷ Leonardo Duarte & Rodrigo Santos, *supra*, at 304.

⁵⁸ Alberto Afonso Monteiro, *supra*, at 15.

⁵⁹ Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (*Commission Guidelines on fines*), Official Journal C 210 of 1.9.2006. Disponível em <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:EN:PDF>

commerce which have been causing disagreements between defendants and the DOJ in the US. However, we consider that this is a necessary step towards the correct direction, which will put Brazil in line with the most developed antitrust jurisdictions and make the country participate in the global discussions regarding volume of affected commerce.

Conclusion

As observed in the analysis above, the concept of volume of commerce gives rise to several controversies for the determination antitrust fines. However, this concept – or any concept related to value of the sales to which the infringement relates – still appears to be the best base amount for fine calculations.

In the US, where the concept has long existed, there are still uncertainties in relation to key aspects and a more clear guidance from the DOJ and courts are needed. These aspects involve aspects such as (i) determination of sales really affected by the conspiracy; (ii) what constitutes domestic commerce and whether indirect sales can be accounted; and (iii) total-price versus component-only volume of commerce.

Brazil, on the other hand, still appears to be behind of the major jurisdictions in that area, failing to clearly link the fine to the amount of sales affected by the infringement. In view of that, I understand that CADE Resolution No.3/2012 should be revised and that the statutory concept of field of business should be interpreted as the product(s) or service(s) potentially affected by the conduct under investigation.

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