International developments

Penalty levels in competition cases in the United States, the European Union and Australia

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The aim of this article is to discuss the levels of penalties for corporations applied in competition cases in the jurisdictions of the United States, the European Union and Australia.[1] It is based mainly on relevant material from the last ten years.

Levels applied

Three aspects of the levels of penalties have been studied: the legal limitations, and the highest and average levels of penalties applied in practice.

Legal limitations for the level of penalties

The US ceiling for maximum penalties is just below the equivalent of A$16 million.[2] It was raised tenfold in November 1990. The penalty can be increased to twice the pecuniary gain derived from the crime or twice the pecuniary loss suffered by the victims.[3] The gain and loss is calculated on the activities by the cartel, not only those of the defendant.[4]

The EU legislation[5] allows a maximum penalty just above the equivalent of A$1.7 million, or a sum in excess thereof but not exceeding 10 per cent of the turnover of the corporation in the preceding business year. According to case law the latter limit must relate to the total turnover, i.e. sale of all products worldwide, and not only the relevant products involved in the infringement.

A contravention of Part IV of the Australian Trade Practices Act allows a maximum penalty of A$10 million per offence for a corporation.[6] The ceiling was raised from A$250 000 in January 1993. For some enumerated contraventions a lower ceiling of A$750 000 is applicable.[7]

Highest penalties[8]

In the United States it was not until the ICI *(Explosives)* case in 1995 that the maximum penalty amount of just below the equivalent of A$16 million was imposed.[9] Since then there are examples of at least 13 further fines at this level or above. The highest penalty was in the *Graphite Electrodes* case of 1998 in which UCAR was fined just above the equivalent of A$165 million.[10] The aggregated amount of penalties for different corporations involved in this infringement was roughly equivalent to A$215 million. Five further fines for corporations above the A$50 million level have been identified.[11]

EU decisions show one example of an even higher penalty. In the *Volkswagen* decision the corporation was fined just below the equivalent

of $A175 million.[12] Other examples of high levels are the *Tetra Pak* decision[13] with a penalty of just below the equivalent of A$130 million and Asea Brown Boveri in the *Pre-insulated pipe* decision[14] with the equivalent of A$120 million. More examples of fines exceeding the equivalent of A$30 million exist.[15] The aggregated amounts of penalties for all corporations involved in the same contravention can reach considerable levels as in the *Board* decision[16] with approximately the equivalent of A$208 million, the *Steel* decision[17] with A$170 million and the *Pre-insulated pipe* decision[18] with A$150 million.

The highest penalty found under the Australian legislation was A$6.6 million each for three corporations involved in the *Pioneer Concrete* case.[19] Six further cases of million-dollar penalties were found for the latest ten-year period.[20] The *Pioneer Concrete* case also stands for the highest aggregated amount found for multiple corporations involved in one single case with A$19.8 million.

Average penalties[21]

Average US penalties had up until 1997 risen to roughly the equivalent of A$4.7 million. According to a study[22] this represents an increase from an average of roughly the equivalent of A$500 000 in the financial year 1991 and A$1.7 million in the financial year 1995.

A calculation of EU penalties concerning 46 corporations fined between 1969 and 1986 shows an average penalty of approximately the equivalent of A$1.1 million per corporation.[23] This average figure is likely to have increased since then.

A recent study carried out for the ACCC covering the period from 1988 to 1998 shows an average level of penalties for corporations contravening the most commonly applied section of the Trade Practices Act (s. 45) of just over A$600 000.[24] The average figures for the other relevant sections were roughly: for s. 46, A$140 000; s. 47, A$37 000; s. 48, A$300 000; and for s. 50, A$4.8 million.[25]

Conclusion

The material indicates that the levels of penalties vary considerably between the US and the EU, on the one hand, and Australia, on the other hand. This is especially interesting to note in the light of the fact that the 'normal' legislative maximum ceiling for penalties is considerably lower in the EU than in Australia.

Reasons for the differing levels

A number of reasons for the differences noted could exist. Some of these are discussed below.

Criteria for the determination of penalties

One reason for the differing levels could be the criteria applied under the respective jurisdiction for the determination of penalties. Written schemes for the determination of levels of penalties have been developed in the US[26] and the EU.[27] The following criteria have been derived from these schemes and from Australian case law.

United States

Factors taken into account in the US for offences related to bid rigging, price fixing or market-allocation agreements are related to the character of the infringement and the characteristics of the offender.

The first factor for determining the character of the contravention is normally the volume of commerce in goods or services affected by the violation.

Factors related to the culpability of the offender are mainly the involvement or tolerance from high-level officials, previous similar misconduct, existence of programs for implementation of legislative requirements, self-reporting, as well as cooperation and acceptance of responsibility. Violations of an order or obstruction of the investigation are also of importance.

Within the limits determined by these factors, the court has some discretion in relation to the need to reflect aspects such as seriousness of the offence, promotion of respect of the law and the role of the organisation in the offence.

European Union

According to EU legislation the main factors for the calculation of the fines are the gravity and the duration of the infringement.[28]

The gravity is assessed according to the nature of the offence, the actual impact on the market and the size of the geographic market. Infringements with limited impact (often trade restrictions of a vertical nature) would, according to the EU guidelines, normally result in fines between the equivalent of just above A$1700 and A$1.7 million.

More serious contraventions (often horizontal or vertical trade restrictions more rigorously applied and with a wider impact, or abuses of a dominant position) would normally result in fines between just above the equivalent of A$1.7 million and A$34 million.

Very serious infringements would result in fines above the A$34 million level. Such contraventions would generally be horizontal restrictions (such as price cartels and market-sharing quotas). Other examples could be partitioning of national markets and clear-cut abuses of a dominant position by monopolies.

Further important aspects according to the European guidelines are the deterrent effect and the legal and economic knowledge usually attributable to large enterprises.

Infringements of medium duration (in general, one to five years) would normally increase the gravity amount up to 50 per cent, and for long duration (more than five years) an increase per year of up to 10 per cent is foreseen. Duration of less than one year would normally not result in any increase.

The fine might be further increased because of circumstances such as repetition, lack of cooperation or obstruction, leadership or instigation of the contravention, retaliatory measures taken to enforce the practices, or a need to exceed the amount of gains improperly made.

The fine might, on the other hand, be reduced because the corporation had only a passive role, had not in practice implemented the agreements, or had terminated the conduct as soon as the Commission intervened. Other such 'reducing' factors can be reasonable doubt on the part of the corporation as to whether the conduct constituted an infringement, that the offence was a result of negligence or was non-intentional, or that the corporation had voluntarily disclosed a cartel to the Commission.

It is also said in the guidelines that account shall be taken 'of certain objective factors such as a specific economic context, any economic or financial benefit derived, specific characteristics of the undertakings and their real ability to pay in a specific social context'.

Australia

Four factors of importance for the determination of the quantum of penalties are mentioned in s. 76 of the Trade Practices Act: the nature and extent of the contravening conduct, the amount of loss or damage caused, the circumstances in which the conduct took place, and any repetition of similar conduct. In addition, case law has added a number of factors of importance.

Judge French has, in what is regarded as the most important judgment related to this problem,[29] enumerated a number of additional factors of importance such as the size of the contravening company, the degree of its power (evidenced by its market share and ease of entry into the market), deliberateness of the contravention and the period over which it extended, involvement of conduct of senior management, existence of corporate culture for compliance with the Act, and disposition to cooperate.

Further factors mentioned in case law are the applicability of the 'totality' principle (total penalty for related offences should not exceed what is proper for the entire contravening conduct involved), existence of similar conduct in the past, and financial position/capacity.

Other aspects such as undertakings not to engage in similar processes, lack of sophistication in terms of the legal environment of the corporation, and obligations and undertakings to compensate the victims of the conduct have also been mentioned in case law.[30]

Conclusion

The criteria set down under the three jurisdictions are fairly similar and they should therefore not be the main cause for the differences noted above.

Hesitation in applying the upper parts of the penalty scales

Although the EU 'normal' maximum limit is much lower than the Australian one, it has some built-in flexibility for very serious infringements, while the Australian legislation lacks such a 'break-through' possibility. The US ceiling is also possible to 'break through' under certain conditions. The flexibility of the US and EU legislation is frequently made use of in more serious cases.

The material shows that, during the 10-year period studied, the highest Australian penalty was far below the legal limitation. This could indicate that the Australian courts and authorities are trying to keep 'some space on the scale' for more serious cases which could occur in the future, and therefore tend to land on the lower part of the scale.

Differences in the economic impact of the contravening conduct in the respective jurisdiction

A criterion that might be weighted and applied differently could be the economic impact of the violation in question. For example, as Australia has only a small proportion of the total business volume of the US or the EU, the weighting of the economic impact of the infringement could result in penalty figures on a lower level under the Australian jurisdiction.

Differences in the weighting or application of the criteria

The material shows that the criteria used in the determination processes should be fairly similar in the jurisdictions in question. This does not, however, preclude that in practice they can be weighted and applied differently.

Conclusion

Although this article is based on a limited study of easily accessible material, it is obvious, however, from this study that Australian levels of penalties differ from the EU and the US levels.

The Australian system with a maximum ceiling without 'break-through' possibilities contains a risk that the court will not always be able to impose a penalty sufficient to disgorge any gains from an infringement plus an additional sum for punishment or, alternatively, a fine proportionate to the harm caused by the contravention.

There is also a risk that this limitation results in lower levels of penalties than in the US and the EU and that the fixed ceiling will impede developments towards higher levels of penalties similar to those that have been noted in those jurisdictions.

NOTES

1. For the purposes of this article it has not been necessary to distinguish between negotiated and non-negotiated penalties. Although the use and the legal implications of negotiated penalties vary between the three jurisdictions, the levels of such penalties should broadly reflect the levels of penalties set by the courts.
2. According to the Sherman Antitrust Act.
3. 18 U.S.C. para. 3571 (d).
4. Spratling, Gary (US Department of Justice), 'The trend towards higher corporate fines: it's a whole new ball game', paper presented at the Eleventh Annual National Institute on White Collar Crime Conference, New Orleans, March 1997.
5. Article 15(2) of Regulation No. 17.
6. Section 76 of the *Trade Practices Act 1974* as amended.
7. Act or omissions relating to ss 45D, 45DB, 45E or 45EA.
8. The examples given are based on the decisions by the competent bodies in the respective jurisdictions and it has generally not been possible to take appeals into account because of the often time-consuming procedures.
9. N.D. Tex. 1995.
10. E.D. Pa 1998.
11. ADM (Lysine) N.D. Ill 1996 on approximately the equivalent of A$105 million and the same company (Citric Acid) N.D. Cal 1996 on A$45 million, Haarmann & Reimer (Citric Acid) N.D. Cal 1997 on A$75 million, HeereMac (Marine Construction and Transportation) N.D. Ill 1997 on A$74 million and Showa Denko (Graphite Electrodes) E.D. Pa 1998 on approximately the equivalent of A$50 million.
12. Decision 98/273/EC.
13. Decision 92/163/EC.
14. Decision 99/60/EC.
15. Among them Solvay (Soda) 91/299/EC on approximately the equivalent of A$30 million, British Steel (Steel) 94/215/EC on A$51 million, Finnboard (Board) 94/601/EC on A$32 million, and Italcementi (Cement) 94/815/EC on approximately the equivalent of A$52 million.
16. See note 15 above.
17. See note 15 above.
18. See note 14 above.
19. (1996) ATPR 41-457.
20. Two cases in TNT (1995) ATPR 41-375 on A$6 million and A$4.1 million respectively and one in each of Ampol/Best Oil (1966) ATPR 41-69 on A$2.5 million, Pioneer Int/Q Blox (1996) ATPR commentary on A$3.9 million, J McPhee (1998)

ATPR 41-268 on A$3.75 million, and Foamlite (1998) ATPR 41-615 on A$1.2 million.
21. See note 8 above.
22. See note 4 above.
23. Calculation based on article 85 and 86 of the Treaty cases enumerated in annex 42 of Bael/Bellis, Competition Law of the EEC, 1987.
24. The median figure was, however, below A$30 000.
25. The median figures for ss 46 and 50 were the same as the average figure but for s. 47 it was roughly A$25 000 and for s. 48 roughly A$220 000.
26. Sentencing guidelines published by the United States Sentencing Commission.
27. Guidelines on the method of setting fines imposed under Article 15(2) of Regulation No. 17 and Article 65(5) of the ECSC Treaty published in the *Official Journal* (OJ C 9, 14.1.98).
28. Article 15(2) of Regulation No. 17.
29. *TPC v CSR* (1991) ATPR 41-076.
30. Steinwall, Annoted TPC 1974, 1999 ed., p. 291.

Australia – US antitrust enforcement cooperation agreement

On 28 April 1999 Australia and the United States signed an agreement that will allow the two countries' antitrust organisations to assist each other.

The agreement was signed in Washington by the US Attorney-General, Ms Janet Reno, the US Federal Trade Commission Chairman, Mr Robert Pitofsky, and the Australian Treasurer, Mr Peter Costello.

The agreement means the Australian and US agencies will be able to exchange evidence for use in antitrust enforcement and help each other to obtain evidence located in the other's country, while assuring confidential information is protected.

In a climate of increasing globalisation, agreements such as this will better equip competition agencies to deal with the complexities of international markets.

The US–Australia agreement will greatly assist the agencies to break international and other anti-competitive cartels.

From Canada

The following items are based on media releases from the Competition Bureau of Canada, dated 17 June 1999 and 15 July 1999 respectively.

Canada – European Union agreement on competition law

On 17 June 1999 the Canadian Prime Minister, Jean Chrétien, announced the signing of a new Canada – European Union agreement on competition law.

The agreement is designed to promote cooperation and coordination between the competition authorities of Canada and the European Communities, and to eliminate, or lessen the impact of, the differences in the application of their respective competition legislation. It sets out a framework for notification, coordination and cooperation on enforcement activities, exchange of information and avoidance of conflict.

It is hoped that the agreement will increase the effectiveness of enforcement by both authorities and reduce the risk of them reaching conflicting or incompatible decisions in individual cases. In particular, it is expected to facilitate closer cooperation in combating global cartels and to enhance cooperation in the control of proposed mergers requiring clearance in both jurisdictions.

Consumers should benefit from enhanced competition in both Canada and the European Communities in terms of reduced prices and increased product choices.

Draft Intellectual Property Enforcement Guidelines

On 11 June 1999 the Competition Bureau released its draft Intellectual Property Enforcement Guidelines for public comment and consultation.

The document outlines the principles governing the Bureau's policy in dealing with issues involving both intellectual property rights and competition law. These guidelines are being

released to promote transparency in the enforcement of the Competition Act and to increase the level of certainty in business matters involving intellectual property issues.

The draft guidelines explain the analytical approach the Bureau will use to determine whether conduct involving intellectual property is anti-competitive. They are available from the Competition Bureau's website at *http://strategis.ic.gc.ca/SSG/ct01538e.html*

From New Zealand

The following items were extracted from the New Zealand Commerce Commission's newsletter Fair's Fair, *May 1999, and from its media releases.*

$700 000 penalty for price fixing

On 30 April 1999 the Auckland High Court ordered Elanco, the animal health division of Eli Lilly & Company (NZ) Limited, and Chemstock Animal Health Limited to pay $700 000 in penalties after they admitted fixing the prices of some of their products in 1996.

Elanco is a manufacturer and wholesaler of animal health remedies while Chemstock is a wholesaler. They compete in a nationwide wholesale market, primarily supplying veterinarians.

The products involved were cattle growth promotants, Compudose 200 and Compudose 400, and Rumesin anti-bloat treatments for cattle.

Elanco and Chemstock agreed not to compete for customers, with Elanco keeping the larger veterinary practices and Chemstock the smaller. This agreement included both companies knowing the minimum prices Elanco would offer to smaller veterinary practices.

In addition, Elanco attempted to include two other wholesalers in similar arrangements; they refused to be involved.

Elanco was ordered to pay a $500 000 penalty and Chemstock $200 000.

Commerce and Fair Trading Act investigation and enforcement criteria

The Commerce Commission has recently published Commerce and Fair Trading Act investigation and enforcement criteria in one document. They are contained in the April 1999 issue of the Commission's newsletter *Compliance*, which is available from Commerce Commission offices and from its website at *http://www.comcom.govt.nz*

The criteria will be applied to all *prima facie* breaches of the Commerce Act or Fair Trading Act that come to the Commission's attention. They will be used to determine whether the Commission will start an investigation and what enforcement action it will take at the end of an investigation.

Pyramid scheme attracts highest fine and compensation order

On 28 May 1999 the Napier District Court imposed a total fine of $30 000 and the highest compensation order a District Court can make, $200 000, on Lisa Morton in relation to two pyramid schemes.

The Commerce Commission prosecuted Ms Morton for running the Joker 88 and Liberty Group Bond pyramid schemes. She was found guilty of both charges on 6 May 1999.

The court imposed the highest total individual fine to date against Ms Morton.

Ms Morton is required to pay approximately $100 compensation each to 1901 people whose orders for certificates were not processed after paying money into her schemes. The Commission will write to each of these people explaining how to get their compensation.

The Commission is considering prosecutions against several other schemes and has warned a number of them.

Telephone number deed authorised

On 17 May 1999 the Commerce Commission authorised the Telephone Number Administration Deed. The Commission was satisfied that the public benefits from the deed

were such that it should be permitted. The deed sets out the principles for the independent administration of numbers, and a process to determine the preferred number portability solution.

The Commission found that although the deed contains an exclusionary provision which limits the allocation of numbers to the signatories, the exclusionary arrangement did not result in any competitive detriments and that the deed would give rise to significant public benefits.

In particular it concluded the following.

- If authorisation was not granted the Government would legislate to enact regulations similar to those in the deed. However, these would be likely to come into force 18 months to two years later than the deed.
- There would be considerable cost to the Government and others in the administration and enforcement of the regulations.
- Earlier introduction of the procedures under the deed would bring significant benefits to the public. The deed would be likely to lead to the earlier commencement of processes resulting in the independent administration of numbers and the study to determine the preferred portability option.

The parties which have signed the deed to date — Newcall Communications Limited, Teamtalk Limited, Telecom New Zealand Limited, Telstra New Zealand Limited and Vodafone New Zealand Limited — had applied for authorisation of the deed. Other telecommunications companies will be able to become signatories on the same terms and conditions.

Electricity Industry Reform Act progress

The first stage of the Electricity Industry Reform Act ownership separation rules took effect on 1 April 1999. By this date, organisations involved in electricity markets must have in place corporate separation of their electricity generation and trading businesses from their lines businesses or have obtained an exemption from the Commerce Commission.

Organisations that may be in breach of the Act at any of its stages could face legal action from competitors, customers, other interested parties and the Commission.

Courts can impose penalties of up to $5 million against an organisation and $500 000 against an individual, plus up to triple any commercial gain made through business practices that breach the Act. In addition, courts can impose a wide range of orders and injunctions.

By the second stage, 1 July 1999, organisations that have made acquisitions in electricity markets must have completed ownership separation of their generation and trading businesses from their lines businesses or have obtained an injunction.

In considering an exemption the Commission must address three questions.

- Would the exemption inhibit competition?
- Would the exemption allow cross-subsidisation between electricity generation and lines businesses?
- Would the exemption create a relationship between electricity lines and supply businesses which is not at arm's length?

Details of how the Commission applies the Electricity Industry Reform Act are available from its website at *http://www.comcom.govt.nz*, and its Wellington office. They have been published as Practice Note 3 and the October 1998 issue of its newsletter *Compliance*.