

Who is/should be liable for breaches of competition law: which rules should govern the attribution of civil and (where it exists) criminal liability to the company, parent company, management & employee?

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1. General Background

It is the purpose of the report to analyse and compare the approaches of the various national jurisdictions as to how liability for infringement of competition rules is allocated between different corporations and individuals, and to identify especially

- What sanctions are available *de lege lata* (as a matter of positive law) against corporations and individuals, especially non-monetary sanctions?
- Could individual criminal or non-criminal sanctions more effectively deter antitrust infringements?
- Under what circumstances should employees share liability for, or be required to contribute to the payment of fines or damages for infringements of competition rules in which they were personally involved?
- Is it justified to make the owners of the company pay the fines when they were not even aware of the wrongdoing?
- Should sanctions imposed on companies be reduced when employees involved in the infringement acted contrary to instructions or to a compliance policy?

As a starting point, many would agree that imposing corporate fines by competition authorities is not sufficient by itself to act as a deterrent. It seems that not even huge fines trickle down the chain to deter individuals. Some countries have introduced individual criminal liability for some antitrust infringements, but in most jurisdictions criminal penalties are not enforced in practice. This questionnaire aims to answer whether additional, more creative individual sanctions should be introduced or whether (corporate) compliance programs should be reinforced without creating new kinds of corporate or individual sanctions.

For this purpose the questions will cover not only the existing legal framework and law enforcement practice of authorities and courts, but will also address *de lege ferenda* issues (issues as to what the law should be) on how existing rules and procedures should be streamlined to create a more efficient system of sanctions.

The scope of this inquiry relates to the infringement of substantive antitrust rules: the prohibition of agreements, concerted practices and decisions by associations of undertakings to restrict competition, and the prohibition of abuse of dominance. Although these set of rules can cover a wide range of business practices, the most common unlawful activities subject to sanctions in practice are cartels and resale price maintenance. The common issue with imposing sanctions on business-related breaches of the law is how to punish the business entity and the individuals who were involved in the wrongdoing. Beyond the allocation of liability within a corporation we will also look at the more specific issues raised by parent and subsidiary relations and acts of

associations of undertakings. The report also intends to cover the possibly different treatment of a company and its employees under leniency programs to highlight the difference between corporate and individual liability. Compliance with antitrust rules is a key issue not only for companies, but also increasingly for competition authorities. We will thus investigate to what extent an undertaking can reduce or even eliminate liability by pointing to a compliance program and how individual breaches of an existing compliance program may impact the liability of the corporation. We will invite national reporters to consider whether instead of, or in addition to introducing harsher sanctions, more efforts are required in the compliance field to deter unlawful business decisions.

A note about issues, however important they might be, that will not be covered, or at least will have a marginal role, in this report. There are some jurisdictions which consider misleading advertising and other forms of unfair commercial practices as part of their competition law regime and empower competition authorities to enforce these rules. This questionnaire does not intend to analyse these rules, yet some national reporters may take examples of best practices from this field of competition law when *de lege feranda* issues are discussed.

The focus of the questionnaire will be on substantive liability. Still, individual liability for procedural breaches (e.g. destroying documents, providing false information) and enforcement breaches (disobeying terms of an infringement or commitment decision of a competition authority) will also be covered, if briefly. Again, we might draw useful conclusions as regards the infringement of substantive antitrust rules by considering the breach of procedural rules.

I am aware that there is no such thing as a perfect questionnaire. In case you have questions or comments that other reporters could benefit from, please drop me an e-mail at tihamer.toth@dentons.com.

Questionnaire

I. Stock taking

In this section we would like to present the existing (*de lege lata*) rules on sanctions relating to the infringement of competition rules. These may address either corporate or individual liability, and impose criminal, or administrative (civil) sanctions. For the purpose of this section, we assume that antitrust rules are basically the same, copying or following closely Articles 101 and 102 TFEU.

The rules

1. Please identify the statutory provisions concerning competition law sanctions, and relevant guidelines issued by the national competition authority (CA).
2. In addition to the rules in your jurisdiction's competition law, are there similar prohibitions imposed by criminal law? If so, please give a brief summary, comparison with the antitrust rules. Specifically, is the personal reach of criminal provisions wider, if so, who can be covered?
3. Which types of sanctions can be applied in your jurisdiction in business-related breaches of law: monetary (corporate and individual), reparatory, custodial, disqualification (managerial, public tenders/contracts), others? (*Please note that this is a general question going beyond competition law.*)
4. Which types of sanctions can be applied in your jurisdiction for breaches of competition rules: monetary (corporate and individual), reparatory, custodial, disqualification (managerial, public tenders/contracts), others? (*For the purposes of this question, please consider procedural and enforcement kind of infringements as well.*)
5. Can criminal law sanctions be imposed on corporations? Under what conditions?
6. Can punitive damages be imposed by a civil court (in addition to compensatory damages)?

The goals

7. Are the goals of imposing competition law sanctions defined by statute, case law, or guidelines of the CA?
8. Is deterrence, retribution or compensation the primary goal? Are there other goals for sanctions?
9. Can the goals pursued by the CA which impact the nature and magnitude of the sanction to be imposed be identified (from the law, fining guidelines or individual decisions)?

Determination/calculation of sanctions

10. Are there hard or soft rules on how to determine the amount/length, etc. of the sanction?
11. Do these rules take into account other sanctions imposed by other bodies against the same person for the same conduct?
12. To what extent, if at all, does the imposition of a sanction on an employee affect the sanction that will be imposed on an employer, or vice-versa?
13. Can the existence of a genuine compliance programme be used to mitigate the fine imposed upon companies for the competition law violations of their employees?

Enforcement

14. As far as the enforcement of competition rules are concerned, which of these is dominant in your jurisdiction: administrative/civil/criminal/quasi criminal (administrative penalty/misdemeanour law)?
15. If there are competition related prohibitions in other laws than competition law, which institutions and which procedures are used to enforce them?
16. Provided that there are multiple institutions involved in enforcing and punishing unlawful conduct, is there a mechanism in place to coordinate the imposition of sanctions by different institutions?
17. Does a corporate leniency application have an impact on individual sanctions?

Parent liability

18. Can the parent company be held liable and be fined for the wrongdoing of its subsidiary?
19. If so, what test is used to impute liability to the parent? Can the parent rely upon a compliance defence (i.e., that it took all reasonable efforts to prevent the violation) to reduce/avoid the fine?
20. If so, do any presumptions exist for the imputation of liability to the parent (for example, the presumption that a parent exercises decisive influence over a wholly-owned subsidiary)? Are the presumptions rebuttable or irrebuttable?
21. If so, how is its fine calculated?

Associations of undertakings

22. How is liability for breaches of law allocated between associations of undertakings and their member undertakings? Are both of them fined? If just one of them is fined, how does the CA make this decision?

23. Do fines imposed on associations of undertakings reflect the turnover of the association or that of its members? Please differentiate between the maximum of the fine and the actual method used by the CA to calculate the fine.

24. What methods are available for the association to request financial contribution from its member undertakings to pay the fine? Can the CA itself establish a secondary liability for the members to pay the fine?

Individual sanctions on CEOs/employees (in case of overlap with previous questions, please refer to the relevant number)

25. Do your statutes allow for the imposition of sanctions on CEOs or other senior employees? If so, what are these sanctions? Are these sanctions administrative, civil or criminal in nature?

26. Can individual sanctions be imposed for the infringement of any competition law rules, or only for the most serious ones (i.e. cartels)?

27. Are these sanctions imposed in the same procedure which targets the undertaking?

If not, are there special procedures for this purpose? Is this conducted by the CA?

28. Is there a link between the decision sanctioning the undertaking and the one addressed to the individual person in the case of a successful legal challenge before a court?

29. To what extent have these sanctions been used? Are there studies about the effectiveness of individual sanctions?

30. If there are no such sanctions, has there ever been intent to introduce it? If so, why did it fail?

31. If there are no such sanctions, what hurdles to their introduction and successful use do you see in your national legal system?

32. Is criminal liability (or are other sanctions) imposed on individual employees for procedural breaches (for example, destroying documents or providing false information)? To what extent have such sanctions been used?

33. If there is a leniency programme in place for employees as well as for companies, how does that application of that programme to employees relate to its application to companies?

Employee/director indirect financial liability

34. Can corporations sue, for damages or compensation, their employees or directors who participated in the unlawful conduct? If so, under what circumstances? Please summarize the relevant court cases.

35. Do director insurance policies cover this type of liability?

II. Are present sanctions efficient/sufficient?

In this section we would like to gather intelligence to evaluate to what extent existing sanctions are efficient. We are aware that it is difficult if not impossible to measure exactly the effectiveness of sanctions. Often there is a self-interest issue distorting responses: why would CAs acknowledge the lack of existing sanctions? Also, why would attorneys/corporations admit that corporate fines are not sufficient and there would be a need for more severe individual sanctions? By efficient sanctions we mean that either their actual imposition, or the realistic likelihood of their imposition soon after the breach would deter the same company, and others from the wrongdoing.

36. Please provide data on sanctions applied in practice between 2013 and 2017:

- The 5 highest fines imposed in one procedure (involving more individual fines)
- The 5 highest fines imposed on individual undertakings
- The 5 highest fines imposed on individuals (be it administrative, misdemeanour or criminal)
- The 5 longest director disqualification orders
- The 5 longest sentences of imprisonment

(in case of lack of cases, especially for the last three sub-questions, please feel free to extend the relevant period for five more years)

37. Have studies been published in your jurisdiction about the effectiveness of existing sanctions (i.e. by the CA, research institutions, etc.)? If so, please provide a summary and a link/reference.

38. How often are criminal sanctions enforced? Please give a list of cases decided in the last five years.

39. If criminal sanctions are not enforced in practice, is there evidence that their deterrent effect is vanishing? Or, is even a small chance of being punished a deterrent?

40. Is recidivism (repeat infringement of the same or similar unlawful conduct) a problem in your jurisdiction? Can you mention cases, examples which show that present sanctions do not deter the same or other companies from infringing the competition rules?

41. Does the CA increase fines/other penalties due to recidivism? If so, to what extent? Is recidivism considered at a group level, including not only the corporation but parents and other companies belonging to the group of undertakings?

42. Can individual sanctions (administrative or criminal) be imposed in the case of recidivism?

III. The way forward, need for change?

In most jurisdictions, fines are imposed on corporation and not on those individuals who organized/participated in the unlawful conduct. Managers are interested in the achievement of profit-related figures, even risking potentially unlawful conduct, whereas sanctions are imposed not on them, but on the company. In many instances, responsible individuals are not even at the company when it comes to the imposition of the sanction (four-five years after the unlawful conduct had taken place). Corporations do not seem to have a positive track record in effectively enforcing measures to punish their responsible employees/directors who actually committed the unlawful conduct.

Even though criminal sanctions could have positive effects, the lack of their consistent and frequent application will undermine their deterrent effects. Over-criminalization of business related unlawful conduct combined with poor enforcement is a general problem in many jurisdictions. There may be other means to induce management to comply with competition rules. There is a need for personal liability and personal sanctions: fines, disqualification measures.

43. Please explain your suggestions how the existing system could be improved (new rules, change in enforcement, etc.). The questions below are not mandatory; they are just meant to give you some ideas about potential issues to be considered.

- The principle of gradualism: shall individual sanctions be encouraged in case of recidivism, in addition to corporate sanctions?
- Are there existing sanctions applied in different fields of law relating to business that could also be applied in competition law?
- Are there existing sanctions relating to procedural or enforcement breaches of law which could also be introduced for breaches of substantive rules?
- Are some remedies more appropriate for one or another defendant and could more than one be employed (targeting different defendants) in the same matter?
- Is there an argument for adopting the sanctions scheme from the jurisdiction where a defendant lives/operates?
- During the consultation of a draft directive on national procedures/sanctions, most stakeholders stated in the public consultation that criminal systems are less suited for the effective enforcement of the EU competition rules. Do you agree with this statement?
- Could or should EU law incorporate individual sanctions?

Useful documents

ICN report (2017)

<http://www.internationalcompetitionnetwork.org/uploads/library/doc1127.pdf>

draft EU Directive

<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2016-0239&format=XML&language=EN>

U.S.

<https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more>