Assessing the relevant volume of commerce in global cartel cases: where do we go from here?

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1. Introduction

As cartel enforcement follows the trail previously blazed by merger control and becomes an international phenomenon, with new jurisdictions adopting anti-cartel laws — and leniency programs — each year, the question of how each jurisdiction should assess the relevant volume of commerce ("VOC") used to determine fines for offenders becomes increasingly important, and the subject of greater scrutiny and debate.[1] Where multiple competition agencies are investigating the same conduct in a global cartel case, the approach those agencies take to issues such as direct versus indirect sales, or inbound versus outbound commerce, can have a profound effect on the fines ultimately imposed, and can raise important issues of double-counting sales and over-penalizing cartel participants.

This concern is particularly acute in the current era, when cartel enforcement regimes have proliferated — there are at least 58 member agencies in the International Competition Network's ("ICN") Cartel Working Group[2] — and there is no global supervisory authority, or even any international best practices guidelines, for the calculation of relevant VOC in global cartel cases. In the absence of any international guidelines, the calculation of VOC in such cases has been addressed by competition agencies in a purely *ad hoc* manner, with some investigations (such as *Air Cargo*) reflecting efforts among some enforcers to co-ordinate their approach to VOC, and other investigations lacking such co-ordination (and almost certainly involving some double-counting of VOC within the penalties ultimately imposed).

These issues, and the resulting uncertainty they create for co-operating parties under leniency regimes, are discussed in greater detail below.

2. Ad hoc approaches produce ad hoc – and inconsistent – results

As noted above, the *Air Cargo* investigation provides perhaps the best example of inter-agency co-operation on the calculation of relevant VOC, and is frequently cited by competition enforcers as the "poster child" for this type of co-operation.[3] As, by its nature, the case involved the shipment of cargo from a point of origin to a point of destination, usually located in two or more jurisdictions, it presented a real risk of double counting VOC if enforcers did not take a common approach in fining on the basis of either inbound or outbound

1 See, for example, J. Arp, C. Halladay, A. Schild, H. Tewksbury and D. Tween, "Death By 1,000 Fines: Are Companies Overpaying?" panel discussion at the American Bar Association Section of Antitrust Law Annual Spring Meeting (Washington, March 27, 2014); and J. Terzaken and P. Huizing, "How Much Is Too Much? A Call For Global Principles to Guide The Punishment Of International Cartels" 27:2 *Antitrust* 53 (Spring 2013).

2 See International Competition Network, Cartel Working Group, "2015-2018 Work Plan" at 1, available online at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1041.pdf>.

3 See notes 18 and 21 *infra*.

commerce, rather than a combination of the two. To take a hypothetical example, if the Japan Fair Trade Commission ("JFTC") were to base its fine on the VOC derived from outbound shipments of cargo from Japan to the United States, and the US Department of Justice ("DOJ") were to adopt a fine based on inbound shipments from Japan, then a cartel member shipping from Japan to the US would be fined twice for the same conduct and **precisely the same commerce**, raising obvious fairness concerns (and perhaps diminishing incentives for parties to co-operate with the agencies).

Recognizing this concern, several agencies in the *Air Cargo* case adopted a more nuanced approach to calculating relevant VOC for purposes of their fines. For example:

- **United States.** Based on a review of the relevant plea agreements, in its calculation of the base fine VOC, the DOJ focused only on **outbound** shipments from the United States. For example, the British Airways plea agreement incorporated a base fine of 20% of the volume of commerce "*for relevant air cargo shipments and passenger flights **from** the United States*".[4] China Airlines Ltd. agreed to pay a fine of US$40 million, based on "*the defendant's sales of air cargo services **from** the United States* [which] *totaled approximately $454.6 million.*"[5] Similarly, the plea agreement entered into by Air France and KLM Royal Dutch Airlines was based on outbound commerce from the U.S, and explicitly did not include "*commerce related to the defendants' cargo shipments on trans-Atlantic routes **into** the United States.*"[6]
- **Canada.** Similar to the US position, the Canadian Competition Bureau ("CCB") calculated VOC using outbound shipments from Canada to other jurisdictions, with fines (to date) imposed on Air France, KLM, Martainair, Qantas, British Airways, Cargolux, Korean Air, and LATAM Airlines using this model. At the Qantas guilty plea hearing, for example, it was expressly noted in the transcript for that matter that the CCB "*agreed to press only traffic that proceeds **out of Canada** into the Qantas system, as opposed to the **reciprocal inward bound cargo** that is obviously brought to Canada through the accused.*"[7] The statements of admissions for the other guilty pleas contained language focused on the fixing of prices for surcharges for cargo shipments "*from Canada*".
- **European Union.** The European Commission ("Commission") fined eleven airlines a total of more than €799 million. The Commission's fines appear to have been based on both the outbound and inbound shipments of each airline; however, it then applied a 50% reduction to this base VOC "*in order to take into account the fact that on these routes part of the harm of the cartel fell outside the EEA.*"[8]
- **Australia.** The Australian Competition and Consumer Commission ("ACCC") initially included the VOC on both outbound and inbound shipments when determining the fine to be imposed on Qantas. However, in its sentencing submissions to Australia's Federal Court, the ACCC argued — and the court accepted — that fines imposed (or to be imposed) on Qantas in other jurisdictions had been taken into account when determining the recommended A$20 million fine. Justice Lindgren accepted these submissions, stating that:

  having regard to the global nature of the market in question, [that] it is appropriate for the Court to take into account the sanctions already imposed or yet to be imposed on Qantas elsewhere, including the penalty of $61 million imposed on it in the USA and the threatened penalty arising from the investigations of European authorities.[9]

These are but four of the jurisdictions involved in the *Air Cargo* investigation that took steps towards assessing VOC in a manner that recognized, to varying degrees, that their domestic fines did not exist in a vacuum and that other enforcers would be penalizing the very same conduct. These en-

4 *United States of America v British Airways plc*, Plea Agreement (August 23, 2007) (DC Cir.) (emphasis added). It should be noted that while VOC from inbound shipments was not included in the base fine, it was considered as an aggravating sentencing factor that led to an upward adjustment to the otherwise-applicable base fine.

5 *United States of America v China Airlines Ltd.*, Plea Agreement (November 3, 2010) (DC Cir.) (emphasis added).

6 *United States of America v Société Air France and Koninklijke Luchtvaart Maatschappij N.V.*, Plea Agreement (July 22, 2008) (DC Cir.) (emphasis added)

7 *R.* v *Qantas Airways Limited,* transcript of appearance dated July 9, 2009 at 4 (emphasis added).

8 European Commission, News Release, "Antitrust: Commission fines 11 air cargo carriers €799 million in price fixing cartel" (9 November 2010), available online at <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en>. This approach was later described by the Director-General for Competition as follows: *"to avoid double counting, we have taken the inward and outward bound sales concerned and divided them by two to avoid overlaps between the two infringements"*: see note 21, *infra*.

9 *Australian Competition and Consumer Commission* v *Qantas Airways Limited* [2008] FCA 1976, at para. 42.

forcers' efforts were laudable, for as government agencies of sovereign nation states they were under no legal obligation to take note of developments in other jurisdictions, however as *ad hoc* efforts they, by their very nature, raise concerns about the consistency and predictability of similar outcomes in future cases. In the absence of clear guidelines, whether national or international, on the treatment of relevant VOC in international cartel cases, it is impossible to predict, *ex ante*, the approach that antitrust enforcers will take to this critical issue. The *Air Cargo* matter represents perhaps the best example of a harmonious approach to assessing VOC — most investigations have not followed this model. For example, this author is aware of at least two instances in which foreign antitrust enforcers knowingly included the direct sales of a cartel member in Canada within the base fine VOC in the foreign jurisdiction, despite being aware that the CCB was conducting a parallel investigation. Such developments unsurprisingly led senior CCB officials to remind the private competition Bar, at a recent event, that the CCB will not refrain from seeking a Canadian fine where direct sales in Canada have already been included in a foreign fine.[10]

3. The need for international best practices on this issue

The calculation of relevant VOC in global cartel cases is a worthy candidate for a set of international best practices. Ideally, such a policy document would be prepared by an entity such as the ICN's Cartel Working Group, which offers an extremely broad and deep roster of experts drawn from nearly 60 enforcement agencies and dozens of experienced non-governmental advisors from around the world. The Cartel Working Group has produced numerous valuable policy documents,[11] and the ICN itself has produced an excellent set of best practices guidelines in the field of merger control, in the form of its *Recommended Practices for Merger Notification Procedures*.[12] Since the release of the initial *Recommended Practices* in 2003, this policy document has made an enormous contribution to promoting convergence across jurisdictions toward a common set of principles governing merger notification and certain aspects of merger review. A similar document setting out common principles relating to the assessment of relevant VOC and the calculation of fines could make a similarly material impact in the field of cartel enforcement.

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Successfully establishing international standards requires broad stakeholder participation in the drafting, and ultimate implementation, of those standards. This is why the ICN Cartel Working Group would be an ideal candidate for preparing the best practices document, as it offers the broadest membership. Other entities, such as the OECD for example, could also provide valuable leadership in this effort should an ICN mandate prove elusive.

4. Improving transparency at the national level

In the absence of a global solution, national competition authorities can still contribute to achieving greater consistency, transparency and predictability by adopting a policy statement on how foreign indirect sales, and foreign penalties, will impact the assessment of relevant VOC in their jurisdiction. For example, in Canada, the CCB has published "Leniency Program FAQs" which state that:

> *[w]here cartel members are penalized in another jurisdiction for the direct sales that led to the indirect sales into Canada, the Bureau may consider, on a case-*

10 This author attended this event in June 2015. However, as the discussion was conducted under Chatham House Rules, both the identity of the CCB speaker and a precise quotation of the speaker's comments have not been included in this article.

11 See the materials available online at <http://www.internationalcompetitionnetwork.org/ library.aspx?search=&group=2&type=0&workshop=0>.

12 See International Competition Network, Recommended Practices for Merger Notification Procedures, available online at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

by-case basis, whether the penalties imposed or likely to be imposed in the foreign jurisdiction ***are adequate to address the economic harm in Canada*** *from the indirect sales.*[13]

This is admittedly a very general statement, which retains scope for inconsistent treatment across investigations on a "*case-by-case*" basis. However, it is nevertheless an important statement of policy, which provides companies with a principled basis upon which to make arguments to the CCB demonstrating that indirect sales should not be considered within the VOC for a Canadian fine where "*adequate*" penalties have been imposed in another jurisdiction. In this author's view, where that fine has been imposed by a jurisdiction with a clear track record of effective cartel enforcement and material penalties, including Australia, Brazil, the European Union, Japan, Korea, and the U.S., among others, there is a strong basis for avoiding double-counting in Canada.

Although it has not yet published a written policy on this issue, the US DOJ has communicated an informal policy concerning parallel enforcement in international cartel cases. That policy examines: (1) whether there is a single global conspiracy in issue; (2) if so, whether US consumers have suffered harm similar to that suffered by consumers abroad; (3) if foreign sanctions have considered the harm to US consumers; and (4) if the foreign sanctions satisfy US deterrence interests.[14] A consideration of these factors may result in a variety of outcomes, including the imposition of a lesser fine in the United States, the DOJ electing not to pursue a separate US prosecution, or no impact at all. The focus on assessing whether the US deterrent interest has been satisfied appears to have been derived from an earlier DOJ policy governing parallel prosecutions at the US state and federal levels.[15]

The DOJ's informal VOC policy would provide far greater clarity for companies if it were formalized and published, perhaps as part of the DOJ's Leniency Program FAQs[16] or among the many other policy documents it has released in the area of criminal enforcement.[17] This is particularly true given that at least one senior DOJ enforcer has publicly acknowledged that the agency has no legal obligation to consider double-counting concerns arising from fines in other jurisdictions.[18] Interestingly, in that interview Mr. Snyder stated that the agency will "*try to limit any overlap in our fining methodologies*" with other jurisdictions, and gave the example of the co-operative approach taken in the *Air Cargo* matter.[19]

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No such policy exists at the Community level within the European Union, an unfortunate gap considering that fines imposed by the Commission in global cartel cases are often among the highest in the world. As a matter of law, under the EU's fining guidelines, the Commission may consider a company's worldwide turnover, including indirect sales outside of the EU:

[w]here the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA

13 Canadian Competition Bureau, "Leniency Program FAQs", (September 2013) at Question 28, available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03593.html> (emphasis added).

14 See *Global Competition Review*, "Hammond: Foreign enforcement may have deterrent value for US" (February 4, 2011); and Terzaken and Huizing, *supra* note 1.

15 United States Department of Justice, "Dual and Successive Prosecution Policy", U.S. Attorneys' Manual, § 9-2.031 (the "Petite Policy"). See also D. Tween and G. Murray, "Death By 1,000 Fines: Is There A Way To Stop The Bleeding", paper submitted to the American Bar Association Section of Antitrust Law Annual Spring Meeting (Washington, March 26-28, 2014).

16 See United States Department of Justice, Antitrust Division, "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters" (November 19, 2008).

17 See the materials available online at <http://www.justice.gov/atr/criminal-enforcement>.

18 Law360, "DOJ's Snyder Says Double Counting Worries Overblown" (April 15, 2015), referring to comments made by Brent Snyder, Deputy Assistant Attorney General.

19 *Ibid.*

> *may not properly reflect the weight of each undertaking in the infringement [...] In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA) [...]*[20]

Moreover, senior Commission officials have confirmed that fines may be based on worldwide turnover in appropriate cases. For example, when interviewed on this issue, former Director-General Alexander Italianer stated that:

> *[w]e exclusively look at the infringement as it has occurred on the European market even if the infringement itself may be broader. The Commission* ***does therefore not take into account fines imposed by other authorities****. We impose fines exclusively in view of the European sales affected by an infringement, even if the infringement is worldwide. It regularly happens that firms are being fined both by the U.S. and also by the Commission for the part of their infringement on European territory.*[21]

Director-General Italianer went on to say that the Commission does "*try to avoid double counting*", and cited the *Air Cargo* matter — again the high-water mark on this issue — as an example.[22] Anecdotally, one may observe that in other matters, such as the *LCD*[23] (imposing total fines of €648,925,000) or *Wire Harness*[24] (imposing total fines of €141,791,000) investigations, the Commission refrained from including indirect sales in its fine amount, but those cases involved EU direct sales that were high enough to generate very substantial fines, and the clear prospect of additional fines in other jurisdictions. In the absence of a clear policy on when indirect sales will be excluded, there is insufficient transparency and predictability for potential co-operating parties — particularly given some of the public statements by Commission officials on this issue.

5. The lack of transparency may impede leniency applications

The former head of criminal enforcement in the US, Scott Hammond, has observed that "*over ninety percent of fines imposed for Sherman Act violations since 1996 can be traced to investigations assisted by leniency applicants*",[25] and that "*co-operation from leniency applicants has cracked more cartels than all other tools at our disposal combined.*"[26] He also added an important corollary to this latter statement — that "*transparency is essential*" and if a company "*cannot predict how it will be treated, it is far less likely to report.*"[27] Expounding on this theme in a subsequent presentation, Mr. Hammond identified transparency and predictability as one of the three "*cornerstones*" of an effective leniency regime, noting that:

> *there must be transparency and predictability* ***to the greatest extent possible*** *throughout a jurisdiction's cartel enforcement program, so that companies can predict with a high degree of certainty how they will be treated if they seek leniency, and what the consequences will be if they do not.*[28]

For most observers of cartel enforcement issues, including this author, these comments will seem axiomatic. However, in a world where the number of anti-cartel regimes increases every year, and penalties have recently increased in almost all of these jurisdictions,[29] the lack of transparency and predictability surrounding a cartel member's total potential liability may impede its willingness to voluntarily self-report its conduct and plead guilty. In the 1990s, the decision on whether to plead guilty and seek leniency may have been facilitated by the relatively few number of jurisdictions (*e.g.*, the United States, Canada, the European Union) with some form of established leniency program.

20 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, OJ C 210/2, 1.9.2006.

21 "Interview with Dr. Alexander Italianer, Director General for Competition, European Commission", *The Antitrust Source* (April 2011) at 3-4 (emphasis added). See also Policy and Regulatory Report, "EU cartel fines to include all indirect EEA sales for deterrence – EC official" (March 8, 2013); and A. Schild, "Death By 1,000 Fines: Double Jeopardy — Some Thoughts From Europe", paper submitted to the American Bar Association Section of Antitrust Law Annual Spring Meeting (Washington, March 26-28, 2014).

22 *Ibid.*

23 Case COMP/39.309, *LCD – Liquid Crystal Displays*, Commission decision of 8 December 2010.

24 Case AT-39748, *Automotive Wire Harnesses*, Commission decision of 10 July 2013.

25 S. Hammond, B. Barnett and G. Werden, "Deterrence and Detection of Cartels: Using All the Tools and Sanctions", paper delivered to the 26th National Institute on White Collar Crime (March 1, 2012).

26 S. Hammond, "Cracking Cartels With Leniency Programs" (October 18, 2005).

27 *Ibid.*

28 S. Hammond, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades", paper delivered to the 24th National Institute on White Collar Crime (February 25, 2010) (emphasis added).

29 International Competition Network, "ICN Member Survey on Trends and Developments in Anti-Cartel Enforcement" (April 29, 2010) at slide 6.

Today, more than 50 jurisdictions offer such programs, and the potential for double-counting of VOC among many of these jurisdictions greatly complicates the liability analysis. That analysis — which effectively asks will the company, on balance, be better off if it co-operates or if it fights — is an essential part of the decision to seek leniency.

Unfortunately, a common — or even recommended — approach to the assessment of relevant VOC does not exist at the international level, and very few jurisdictions have addressed the issue at the national level. The "cornerstone" of an effective leniency program that transparency and predictability represent is thus weakened, and will continue to be eroded with the increase of cartel enforcement regimes, in the absence of a common approach to this important issue. Like the situation with merger control a decade ago, where the inconsistencies raised by the proliferation of notification regimes led to the intervention of the ICN and the adoption of the *Recommended Practices for Merger Notification Procedures*, this author believes that the time has come for convergence in the area of VOC and fine calculation in international cartel cases.

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