BEA BRIEFING

Fines and Penalties in the U.S. International Transactions Accounts

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NEWLY DEVELOPED estimates have been introduced in the U.S. international transactions accounts (ITAs) of fines and penalties paid by foreign corporations to the U.S. government and U.S. private purchasers, and of fines and penalties paid by U.S. corporations to foreign governments.

The new estimates are a component of unilateral current transfers. Fines and penalties imposed by the U.S. government on foreign corporations are recorded as inward current transfers (credits), reflecting receipts of funds by the U.S. Department of the Treasury as a result of judgments rendered by the U.S. Department of Justice and other agencies of the U.S. government (ITA table 1, line 37). Receipts from U.S. private class action settlements against foreign corporations are recorded as inward current transfers (credits) in ITA table 1, line 38. Fines and penalties imposed by foreign governments, including the European Commission, are recorded as outward current transfers (debits), reflecting the payment of funds by U.S. corporations to foreign governments (ITA table 1, line 38).

A large share of these outward and inward transfers result from the prosecution of international cartels, which are voluntary associations of two or more legal entities—usually large multinational corporations—that conspire to restrict international or domestic trade, fix prices, or allocate market shares with the aim of increasing the profits of their members. International cartels are those with members located in two or more countries. "International cartels tend to be larger, better publicized, more injurious to markets, and geographically more widespread than the many more numerous local cartels. Many international cartels are virtually global in their operations."[1]

The U.S. Department of Justice and the European Commission are the world leaders in the prosecution of international cartels; both use similar judicial frameworks for reaching decisions. Over 100 Competition Authorities in other countries also prosecute international cartels, though most not as vigorously as the United States and the European Union; the judicial framework for many of these authorities is patterned after the U.S. and European model. The data used by the Bureau of Economic Analysis (BEA) to estimate transfers related to fines and penalties are for the period from the first quarter of 1999 through the first quarter of 2013. These are years of stepped-up enforcement of sanctions against cartels, both by the United States and the European Commission.

In addition to sanctions against international cartels, the new estimates include fines and penalties for violations of other U.S. laws. Most of these sanctions relate to illegal transactions conducted by, or through, banks and nonbank financial institutions, such as fines for moving money through the financial system on behalf of illegal entities, monetary transactions with prohibited countries, money laundering, wire transfer fraud, and manipulation of the Libor bank rate. The new estimates also include sanctions for corrupt business practices under the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA). The United States is the dominant player and worldwide leader in prosecution of foreign corruption and bribery cases. About 40 countries have enacted legislation patterned after the U.S. model, but many have only a limited enforcement staff. Data related to fines and penalties under the FCPA begin in 2002, but most activity is concentrated in 2008–2012. Data for the "other (primarily financial) legislation" begin in 2005, with most activity concentrated in 2009–2012.

Data are organized by the legislation that establishes the authority and delegates the responsibility

1. John M. Connor, "Private Recoveries in International Cartel Cases Worldwide: What Do the Data Show?" *Competition Policy International Antitrust Chronicle,* no. 1 (December 2012): 2–24; also available at the Social Science Research Network at ssrn.com; search 2165431.

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for enforcement to individual government agencies.

Legislation

U.S. antitrust (cartel) legislation

The Sherman Act (1890) and the Clayton Act (1914) provide the legislative authorizations to prosecute companies that attempt to restrain trade within the United States or with foreign nations, to engage in listed prohibited discriminatory practices to lessen competition, or to exercise undue influence on competitors through a dominant market position. In addition, the Clayton Act provides that the amount of damages recoverable may exceed the amount of actual damages sustained. If the federal government or its agencies have been victims of an antitrust (cartel) violation, the Department of Justice may obtain up to treble damages in criminal cases under the Clayton Act. "Moreover, private parties (including state and local governments) may recover up to three times the damages they suffer as a result of an antitrust violation, and they may use successful federal prosecution of collusion as prima facie evidence against a defendant in a follow-on suit for treble damages."[2] "Monopolization, attempts and conspiracies to monopolize, or attempts to exert undue influence on competitors through a dominant market position are generally prosecuted as civil cases."[3]

The Department of Justice is the only U.S. government agency that has the authority to bring criminal charges in antitrust matters. Trials are rare; almost all convictions are made by plea bargain agreements. There are no appeal rights from guilty pleas because these are forfeited when pleading guilty and entering into a plea agreement. In addition, parties that have been harmed may bring civil class action suits against the defendant. These class action suits have resulted in even larger monetary penalties against foreign corporations than those arranged by plea agreements with the Department of Justice.

European Commission and other foreign antitrust legislation

Antitrust legislation administered by the European Commission (EC) is patterned closely after the U.S. system. The general definition of restraint of trade or commerce is similar to the U.S. definition as are the list of prohibited discriminatory practices, which are frequently grouped as price-fixing, bid-rigging, and market allocation schemes. Especially in recent years, U.S. and EC authorities have worked closely together and shared information in order to expand the reach of their judicial authorities and to apply consistent guidelines to limit illegal restraints of trade. The EC generally handles the most complex cases and cases that cross the national boundaries of the European Union member states. The EC is supplemented by courts in each member state that apply antitrust regulations to situations within their states. The legislative criteria and principles used by the member states are consistent with those of the EC. Since the early 2000s, the 27 National Competition Authorities of the member states have begun to rival the EC in importance in fining international cartels. Decisions at the EC level or at the member state level are frequently appealed to a higher level tribunal. Lower level decisions are rarely overturned in their entirety, but fines are often reduced by small amounts. In contrast to the judicial system in the United States, few class action suits are initiated.

Antitrust laws in Canada are also similar to those in the U.S. and EC systems. Decisions are made through plea bargain agreements. Class action suits are as frequent as in the United States but only single damages are allowed for plaintiffs.

Foreign Corrupt Practices Act

The U.S. Foreign Corrupt Practices Act (FCPA) was enacted in 1977 as part of the Securities Exchange Act of 1934, and amended in 1988 and 1998. "The law was enacted because of concerns over payments made either directly or indirectly by corporations to foreign government officials or foreign political parties in order to obtain or retain business. Yet, prior to its passage, such payments were not directly prohibited under U.S. law, even though many payments were thought to be illegal in some sense of the word. The act as originally passed and later amended has two major provisions: the anti-bribery provisions and the books and records and internal control provisions."[4]

The Act is extensive in its jurisdiction over foreign companies and its coverage of foreign bribery. A non-U.S. company could engage in illegal acts to obtain or to retain business in the United States, but in most cases, the illegal acts do not occur within the territory of the United States. "The anti-bribery provisions apply even if the conduct at issue has no U.S. nexus. Thus, the FCPA can be violated even if an improper payment scheme is devised and executed entirely outside of the United States. Many of the most high-profile FCPA enforcement actions have been against

2. *An Antitrust Primer for Federal Law Enforcement Personnel,* Antitrust Division, U.S. Department of Justice (April 2005): 3.

3. *An Antitrust Primer for Federal Law Enforcement Personnel,* 4.

4. www.FCPAProfessor.com/fcpa-101.

foreign companies operating abroad."[5] Only sanctions against non-U.S. companies are included in BEA's ITA estimates.

The Department of Justice is responsible for criminal prosecutions and some civil prosecutions, and the Securities and Exchange Commission is responsible for most civil prosecutions. Most civil enforcement actions with the Securities and Exchange Commission are resolved through a nonprosecution agreement, a deferred prosecution agreement, disgorgement, fine or some combination of these actions through a privately negotiated agreement with the Securities and Exchange Commission. Criminal enforcement actions are by a privately negotiated plea agreement between the company and the Department of Justice. A criminal violation can result in a fine up to twice the benefit the payor sought to obtain through the improper payment.[6] Resolutions of FCPA issues against non-U.S. companies through private litigations and securities class action lawsuits are not included in the estimates.

Other (primarily financial) legislation

Prosecutions under several other U.S. laws also result in large cross-border fines and penalties. Though not related to antitrust or FCPA issues, violations of these laws indicate significant wrongdoing and result in substantial losses to the plaintiffs. The sanctions imposed in some cases are even larger than many of those imposed in antitrust cases.

Significant prosecutions in recent years have been brought under the Trading With the Enemy Act (TWEA), the International Economic Emergency Powers Act (IEEPA), and the Bank Records and Foreign Transactions Act, which is also known as the Bank Secrecy Act (BSA).

The TWEA prohibits foreign corporations and individuals from engaging in financial transactions involving or benefiting foreign nationals in certain countries, and it also prohibits attempts to evade or avoid these restrictions. Transactions benefiting, or with, Cuba, Iran, Libya, Sudan, and Myanmar are prohibited. The IEEPA makes it a crime for foreigners to willfully attempt to commit, to conspire to commit, or to aid and abet restrictions specified by U.S. law for a specific country. The IEEPA and TWEA regulations are administered by the Treasury Department's Office of Foreign Assets Control. The BSA makes it a crime to willfully fail to establish an adequate antimoney-laundering program.

Additional laws and regulations used in prosecutions of unlawful practices are those by the Securities and Exchange Commission (for violations of the Securities Exchange Act), by the Commodity Futures Trading Commission (for violations of the Commodity Exchange Act), by the Department of Justice (for violations of the False Claims Act), and by the Department of Justice and Environmental Protection Agency (for violations of the Clean Water Act.)

Trends in fines and penalties by legislative authority

Estimates of fines and penalties are presented below and in table 1 by the legislation that authorizes their imposition. From the first quarter of 1999 through the first quarter of 2013, net U.S. unilateral transfers totaled $25.6 billion—$32.9 billion in U.S. receipts and $7.3 billion in U.S. payments (table 1).

Antitrust fines

Fines and penalties imposed on foreign corporations for violations of the Sherman and Clayton Acts totaled $6.8 billion in receipts from the first quarter of 1999 through the first quarter of 2013 (table 1). These fines were imposed on international cartels—either international or global in scope—that engaged in some form of explicit or direct communication resulting in price-fixing, bid-rigging, or market allocation schemes. These fines resulted from plea agreements with the Department of Justice in which the defendant pleaded guilty and agreed to the monetary and other conditions ordered by the Department of Justice. Most of

Table 1. Fines and Penalties by Legislative Authority, 1999:I–2013:I
[Millions of dollars]

Gross unilateral transfers (credits)	
Antitrust	20,453
U.S. Department of Justice	6,811
U.S. class action suits	13,642
Direct	10,570
Indirect	3,072
Gross unilateral transfers (debits)	
Antitrust	–7,271
European Commission	–6,416
European Union National Competition Authorities	–508
Other governments	–346
Gross unilateral transfers (credits)	
Anti-bribery	3,235
U.S. Foreign Corrupt Practices Act	3,235
Gross unilateral transfers (credits)	
Other (primarily financial) legislation	9,218
Trading With the Enemy Act, International Economic Emergency Powers Act, and Bank Records and Foreign Transactions Act (or Bank Secrecy Act)	9,218
Net U.S. unilateral transfers under antitrust, anti-bribery, and other (primarily financial) legislation	**25,635**

5. www.FCPAProfessor.com/fcpa-101.
6. www.FCPAProfessor.com/fcpa-101.

these fines were for collusive activities of large multinational corporations in Europe and East Asia. Many of these cartels lasted several years before discovery and were centered in industries where barriers to entry were high, major producers were few, and products were homogeneous—electronics, transportation, automobiles, pharmaceuticals, and food additives. The size of fines has risen sharply in the last few years. The timing of these receipts is irregular, but $4.4 billion of these receipts occurred in 2007–2012.

Private parties may seek civil penalties through class action suits. Recoveries through class action suits from the first quarter of 1999 through the first quarter of 2013 were $13.6 billion, compared with $6.8 billion for Department of Justice recoveries (table 1). Class action suits may be divided into direct and indirect classes. Direct recoveries are those by large (usually manufacturing) purchasers who purchase products directly from producers, and indirect recoveries are those by smaller (usually retail or individual) purchasers who purchase products through a third party. Of these, direct recoveries were $10.6 billion and indirect recoveries were $3.1 billion. Some private parties may opt out of civil class action suits and bring their own direct action suits against the defendant. Sometimes, courts do not permit class actions to proceed, so larger plaintiffs file individual direct action suits. Most settlements, both in Department of Justice plea agreements and private class action suits, resulted in considerably less in actual recoveries than the potential treble damages cited in the governing legislation.

Fines and penalties imposed on U.S. corporations by foreign governments resulted in U.S. payments of $7.3 billion from the first quarter of 1999 through the first quarter of 2013 (table 1). Of this total, $6.4 billion of payments were to the EC and an additional $0.5 billion to the National Competition Authorities of member states of the European Union. The remaining $0.3 billion was paid to other national governments, primarily those of South Korea, Australia, New Zealand, and Brazil.

Foreign Corrupt Practices Act fines

Most fines imposed on foreign companies by the Department of Justice and the Securities and Exchange Commission under the anti-bribery and record-keeping provisions of the FCPA are smaller per violation and in total than those in the antitrust categories. From the first quarter of 2004 through the first quarter of 2013, they totaled $3.2 billion. Nearly all receipts occurred in 2008–2012, when FCPA officials expanded their jurisdictional reach over activities of foreign companies and the size of fines imposed increased considerably.

Other (primarily financial) fines

Several departments of the U.S. government enforce laws far removed from the areas of international cartels and antitrust. These areas of enforcement have become an increasingly large source of fines and penalties in the past 4 years, related in large part to geopolitical developments in the Middle East and consequences from the financial crisis of 2007–2008 and the recession of 2008–2009. The Department of Justice and the Securities and Exchange Commission imposed sanctions on foreign companies for financial transactions with prohibited countries, money laundering, and banking fraud. Other violations resulted from the manipulation of the Libor interest rate, the promotion of financial and other products with false claims about their content or effectiveness, and the violation of the Clean Water Act. From the first quarter of 2005 through the first quarter of 2013, these fines totaled $9.2 billion; $8.7 billion of these receipts occurred from the first quarter of 2008 through the first quarter of 2013.

Methods, definitions, valuation, timing, and residency

The data consist of 660 legal cases. About 560 of these cases (which account for about 70 percent of the value of total receipts plus total payments) are related to international cartels and 100 to non-antitrust violations of U.S. government laws.

Definitions, valuation, and timing. By definition, an international cartel must have members from at least two countries; often, it has members from more than two countries. A single company may often be a member of several cartels involving multiple products and markets.

The term "penalty" is defined broadly to include all payments of a compulsory nature. Thus, in addition to fines, it may also include restitutions, disgorgement, and prejudgment interest if these are part of the decision of the judicial authority or terms of the private settlement. The term "penalty" includes both criminal and civil penalties.

The time of recording of the transactions is the date of the decision by the government authority. In criminal law systems, the date is when a court approves a plea bargain; in the European Union and other administrative law systems, the date is when the antitrust authority issues its decision. For private class action suits, it is the date that the preliminary notice of agreement is submitted for approval to the supervising court by

the first large member or all members of the class; this is considered the first official public statement that a settlement has been reached. However, defendants may be given a few months to pay their fines, and some defendants in class action suits may delay agreeing to settle for several months after the first firm settles.

If the penalty is stated in foreign currencies, the exchange rate is the rate on the date of decision.

Payments may be received by governments as a result of decisions by antitrust and competition authorities, commissions, tribunals, or other regulatory governmental agencies or by businesses and individuals if prosecuted through class action proceedings in the private sector.

Residency. The estimates for the international transactions accounts include only sanctions against nonresident members of international cartels (or nonresident companies if not a member of a cartel); that is, members of the cartel must be residents of countries different from the country of the governing body imposing the sanction in order to be classified as a cross-border transaction. Fines imposed on resident members of cartels are considered domestic transactions and are not included in the international accounts.

Thus, if the fining authority in Italy finds that a U.S. affiliate located in Italy violated the law, the violation would be considered a domestic transaction and the amount of the fine would not be entered in the international accounts of the United States. However, if the fining authority in Italy finds that the U.S. parent located in the United States violated the law, the violation would be an international transaction and the amount of fine paid to Italy would be entered in the international accounts of the United States.

Payment of fines. The business unit most likely to be the payor of the fine is the defendant listed in court documents that announced the judgment or settlement. In most cases this is the parent, and in some cases, an affiliate, usually an affiliate prominent in the managerial structure. In making its determination (or in approving settlements negotiated between prosecutors and companies), the court generally searches for the highest level of managerial decisionmakers who had knowledge of unlawful activities or that conspired to engage in illegal activities. For antitrust cases in the United States, the court usually places the locus of managerial decisionmaking at the parent or prominent affiliate level. For antitrust cases considered by the European Commission, the Commission is required to place the locus of decisionmaking at the level of the parent. For FCPA cases and for cases of fraud and tax evasion, the locus of decisionmaking is also usually at the parent level. The highest level defendant cited in the court documents has both the legal, as well as financial, obligation to remit funds to the court, usually within a short period of time after the decision is rendered.

The exact payment schedule of the fines is unknown. The predominant practice of antitrust authorities surveyed in this study is to require full payment of most fines within 14 to 90 days of the date of decision, and in some cases, within 5 days. In the European Union, where appeals of fines are frequent, violators are required to place their fines in escrow accounts during the very lengthy appeals. Other (primarily financial) and FCPA cases also almost always require prompt payment. Only for a few of the very largest fines (mostly in the last few years) have court documents included specific provisions related to installment, rather than lump-sum, payments.

The residence of the payor determines the geographic origin of the payment of funds. The country of payment may or may not coincide with the countries in which the illegal activity occurred.

Data sources

For antitrust penalties, the major data sources are the decisions of U.S. courts, U.S. government agencies, and U.S. state governments as well as the decisions of government authorities in Canada and the European Commission. Decisions and related documents are made publicly available by these agencies. BEA's ITA estimates are consistent with those of Professor John Connor, Professor Emeritus at Purdue University, after adjustment to include only those transactions related to the United States and to meet the strict residency requirements for compilation of the U.S. international transactions accounts. Though technically a sample, the coverage of these transactions is judged to be a virtually complete enumeration of international cartels that have been fined by government authorities. BEA has supplemented its work by adopting Connor's estimates of fines and penalties (again after adjustment to include only U.S. transactions and to meet residency requirements) adjudicated by other competition authorities abroad—in Australia, Germany, Japan, Korea, Taiwan, Finland, Sweden, Norway, Denmark, the Netherlands, France, Italy, other European Union member countries, and Israel—and his estimates of monetary fines and penalties from private class action suits in the United States (the value of coupons and injunctive relief, which is often substantial, is ignored). The coverage for private class action suits is much less complete than that for the government decisions

because of the inherent difficulty in identifying and measuring class action settlements. Class action suits are largely reached by private negotiations between cartelists and the injured parties and the final outcomes are frequently never made public.

For penalties in the other (primarily financial) legislation category and the Foreign Corrupt Practices Act category, the major data sources are the final decisions of the U.S. government agencies responsible for the administration and enforcement of various U.S. laws. The Department of Justice has jurisdiction over situations of criminal misconduct (as well as some civil misconduct), including illegal transactions with foreigners, money laundering, and fraud. In the financial area, decisions are rendered by the Securities and Exchange Commission and by the Commodity Futures Trading Commission, often in coordination with the Department of Justice. The Department of Justice in coordination with the Environmental Protection Agency also adjudicates violations of the Clean Water Act. Decisions and related documents are made publicly available by these agencies. Coverage of cross-border transfers is believed to be virtually complete for these agencies from the first quarter of 2005 through the first quarter of 2013. Sanctions imposed in preceding years on foreign corporations are few and small in dollar value and therefore are not included in BEA's ITA estimates.

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