



**Review of the 1998 OECD Recommendation  
concerning Effective Action against  
Hard Core Cartels  
2019**



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## Chapter 1. Background

A cartel is a conspiracy among competitors to raise prices or control output or both, thus making goods and services unavailable to some customers and unnecessarily expensive for others (as detailed in Section 3). Economic harm from cartels is very substantial. Between 1990 and 2016, nominal affected sales by international hard core cartels exceeded USD 50 trillion (United States dollars). Gross cartel overcharges exceeded USD 1.5 trillion. More than 100 000 companies were liable for international price fixing (Connor, 2016<sup>[1]</sup>).

Cartel activity is not showing signs of abating: in the six-year period between 2010 and 2016 alone, a record 75 new hard core cartels were uncovered each year (Connor, 2016<sup>[1]</sup>).

In 1998, the OECD Council adopted the Recommendation concerning Effective Action against Hard Core Cartels [[OECD/LEGAL/0294](#)] (hereafter the “Recommendation”, reproduced in Annex A). The Recommendation recommends that Members and Partners that have adhered to it (hereafter the “Adherents”) ensure that their laws halt and deter hard core cartels and provide for effective sanctions, enforcement procedures and investigative tools, as well as for institutions with powers adequate to detect and remedy such cartels. It also recommends that Adherents co-operate with one another to prevent hard core cartels in a manner consistent with countries’ laws, regulations and important interests.

After the adoption of the Recommendation, the Competition Committee made the fight against cartels one of its priority discussion topics, organising over 20 roundtables and hearings, and holding relevant sessions in the Global Forum on Competition and the Latin America and Caribbean Competition Forum.<sup>1</sup> The Competition Committee also produced three reports to the Council on countries’ experiences with the Recommendation, the last in 2005 (OECD, 2000<sup>[2]</sup>) (OECD, 2003<sup>[3]</sup>) (OECD, 2005<sup>[4]</sup>).

The fight against cartels has been a priority of competition law enforcement in Adherents, both before and, particularly, after the Recommendation. As a result, since the last monitoring report to Council [C(2005)159], there have been important developments in the legal regimes and the enforcement methods against hard core cartels which include: i) introduction and strengthening of amnesty/leniency programmes offering the opportunity to cartel members to self-report their conduct and provide information and evidence on the cartel, in exchange for immunity or reduced penalties; ii) substantial increases of fines against companies that engage in cartel conduct; iii) introduction of sanctions against individuals; iv) criminalisation of cartels in several jurisdictions; v) plea bargaining and settlement procedures that reduce fines for parties who co-operate with competition authorities in cartel proceedings and thus allow for faster resolution of cases; and vi) more private enforcement actions seeking compensation for harm caused by cartels.

International co-operation and co-ordination among competition authorities in cartel investigations has also progressed. There have been simultaneous dawn raids in parallel investigations, co-ordination of enforcement activities and decisions, and co-ordination or consultation to avoid double jeopardy or double counting of fines. International co-operation was strengthened by the adoption in 2014 of the Recommendation of the

Council Concerning International Co-operation on Competition Investigations and Proceedings [[OECD/LEGAL/0408](#)] (hereafter the “Recommendation on International Co-operation”) (OECD, 2014<sup>[5]</sup>).

The range and importance of developments in the enforcement against cartels led the Competition Committee to decide to monitor the implementation of this Recommendation again, for the first time since 2005. The Competition Committee’s Working Party 3 on Co-operation and Enforcement (hereafter the “WP3”) started a discussion in its meeting of 29 November 2016, on the basis of a Secretariat scoping note setting out developments in enforcement against hard core cartels (OECD, 2016<sup>[6]</sup>), and decided that the Secretariat would conduct a survey to prepare a report on developments and trends in the fight against cartels (OECD, 2017<sup>[7]</sup>) (hereafter the “Survey”, Annex B).

As Brazil and Romania have adhered to the Recommendation, and since discussions in the Competition Committee have demonstrated a strong interest from other non-Members to implement the Recommendation even without formally adhering to it, the Survey was also sent to all Participants in the Competition Committee, as well as the European Commission.

In order to obtain a comprehensive picture the Survey covered a broad range of relevant questions, namely: i) the definition of hard core cartels; ii) sanctions for companies and individuals participating in hard core cartels; iii) the use of amnesty/leniency programmes; iv) the use of settlements, plea bargaining and commitment procedures; v) experiences with *ex officio* investigations and proactive cartel detection methods; vi) private enforcement; and vii) the status of international co-operation and investigative assistance between competition authorities. Competition authorities from 42 jurisdictions<sup>2</sup> responded. The Secretariat presented the Survey’s results in two WP3 meetings, of 20 June and 4 December 2017, where the delegates presented developments on enforcement against hard core cartels in their respective jurisdictions, and discussed possible updates to the Recommendation.

This draft report was prepared by the Secretariat on the basis of the answers to the Survey and delegates’ presentations on their experiences with the Recommendation in the WP3 meetings of 20 June and 4 December 2017. It also takes into account the considerable OECD work on cartels since the adoption of the Recommendation.

The report looks at actions taken by the Survey respondents in the areas covered by the Recommendation and identifies trends. It is structured as follows: key findings (Chapter 2. ); definition of hard core cartels (Chapter 3. ); exemptions and defences from the coverage of domestic laws on hard core cartels (Chapter 4. ); detection (Chapter 5. ); investigative powers (Chapter 6. ); case resolution (Chapter 7. ); sanctions (Chapter 8. ); private enforcement seeking compensation for harm caused by hard core cartels (Chapter 9. ); international co-operation in cross-border cartels (Chapter 10. ); advocacy by competition authorities to increase public awareness of the benefits of competition and prevent cartels (Chapter 11. ).

In parallel, the Competition Committee discussed the revision of the Recommendation to bring it into line with significant cartel enforcement developments that have taken place since the Recommendation was adopted in 1998.



## Notes

<sup>1</sup> The relevant OECD meetings and documents related to them can be found in the “references” section of this report.

<sup>2</sup> The 42 jurisdictions are: Australia, Belgium, Brazil, Bulgaria, Canada, Chile (both the Tribunal de Defensa de la Libre Competencia - TDLC and the Fiscalía Nacional Económica - FNE), Chinese Taipei, Colombia, Costa Rica (both the Comisión para Promover la Competencia - COPROCOM and the Superintendencia de Telecomunicaciones –SUTEL), Croatia, the Czech Republic, Denmark, Estonia, the European Commission, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Japan, Korea, Lithuania, Mexico, the Netherlands, New Zealand, Norway, Peru, Poland, Romania, the Russian Federation, the Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom, Ukraine and the United States (both the Antitrust Division of the Department of Justice and the Federal Trade Commission).



## Chapter 2. Key findings

The Recommendation has served as a catalyst for commitment to effective action against hard core cartels, and has contributed to a convergence in cartel enforcement efforts. Since 1998, almost all the Survey respondents have taken action to improve the effectiveness of their enforcement against hard core cartels.

Effective enforcement against hard core cartels has been a Competition Committee and WP3 priority topic throughout the last 20 years.

The implementation of **leniency programmes** in all OECD Members, and almost all Partners, is the most notable development since the adoption of the Recommendation. All OECD Members have a leniency programme in place, and consider it the most effective tool for detecting and punishing cartels.

A large number of investigations are initiated at the relevant competition authorities' own discretion (*ex officio*), making use of a variety of sources, such as: complaints from third parties; publicly available information; screening of available data such as public procurement data; information from other investigations; and information from other governmental agencies. In order to increase detection, several agencies have introduced the possibility for third parties to report the existence of cartels or any other useful knowledge in an anonymous way, through whistle-blower programmes.

**Settlements** are increasingly used to close cases, thus saving resources and allowing for a faster resolution of cases. The use and effects of settlement procedures vary across jurisdictions.

The level of statutory and imposed **sanctions** against cartels has increased in the majority of Survey respondents. Some jurisdictions are considering increasing the level of fines that they can impose as well as introducing new sanctions, including criminal ones.

**Private enforcement** against hard core cartels, whereby those who have suffered harm from cartel activity bring claims for damages against cartel members, is acknowledged as an important complement to public enforcement by competition authorities. However, although almost all Survey respondents have adopted measures to encourage harmed parties to bring actions, in general private enforcement is still underdeveloped in many jurisdictions.

**International co-operation** among competition authorities in cartel investigations has been significantly enhanced. Many bilateral and some multilateral international co-operation agreements have been signed between competition authorities, which, although not specific to cartels, can facilitate co-operation in cartel cases. Nevertheless, barriers to the exchange of confidential information and sustained investigative assistance between competition authorities remain.

Although the relevance of the Recommendation is undisputed, there may be need to update it to guide domestic reforms and policy developments improving the effectiveness of cartel enforcement, taking into account especially the developments among Survey respondents outlined above.



## Chapter 3. Definition of hard core cartels

### 3.1. Background and developments

The Recommendation defines a hard core cartel as “an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce”.

The Recommendation thus identifies four types of conduct as hard core cartels: (a) horizontal price fixing; (b) bid rigging; (c) output restrictions or quotas; and (d) market division or sharing by allocating customers, suppliers, territories or lines of commerce.

By singling out the types of conduct that were of greater concern to Members at time of adoption, the Recommendation set common standards and was a significant step in the development of a common terminology, even though jurisdictions use their own definitions, prohibitions and exemptions relating to cartels. In 2000, the OECD found that the Recommendation spurred legislative reform, including repealing national statutory exemptions from the definition of hard core cartels and thus exposing to antitrust liability anti-competitive conduct that had been previously immune (OECD, 2000<sup>[2]</sup>).

Since the adoption of the Recommendation, there have been debates on the definition of hard core cartels and whether they should be always illegal, without needing to prove their actual adverse effects on markets. The Survey asked jurisdictions to identify difficulties in capturing all hard core cartels in their domestic definition of cartels.

In addition, the fight against cartel conduct in public procurement (bid rigging) took on such importance over the years that the OECD developed Guidelines (OECD, 2009<sup>[8]</sup>), and later a Recommendation on Fighting Bid Rigging in Public Procurement [[OECD/LEGAL/0396](#)] (which incorporates the Guidelines) to consolidate OECD good practices on ways to make public procurement more competitive and less at risk of collusion.

The majority of Survey respondents confirmed that domestic definitions of hard core cartels are adequate. However, 11 jurisdictions replied that the coverage of hard core cartels in their laws is not always clear. Some examples out of the Survey responses follow.

### Box 3.1. Challenges concerning the coverage of definitions of hard core cartels

In Spain, it may prove challenging to bring under their definition of hard core cartels information exchanges between competitors regarding individualised data on future prices or quantities (files S/0086/08 Peluquería Profesional and S/0482/13 Fabricantes automóviles).

The European Commission highlights that it can take action against cartel members who are actual or potential competitors in hub and spoke cartels, but may be difficult to pursue cartel facilitators. Hub and spoke cartels refer to collusive agreements among competitors through a third party who is not a competitor, but which usually has a vertical relationship with the competitors (such as a consultant), and facilitates the collusion as a “hub”. The European Commission also reported challenges in capturing as antitrust infringements algorithms of competition firms that communicate with each other, and stressed the need for new tools to detect collusive information exchanges on future prices, business strategy or other types of market-sensitive information.

In Australia joint venture exemptions to cartel conduct were perceived as too narrow. In October 2017, joint ventures for the acquisition of goods or services, as well as arrangements or understandings, were exempted from the definition of cartel conduct ([www.accc.gov.au/media-release/accc-welcomes-new-era-in-competition-law](http://www.accc.gov.au/media-release/accc-welcomes-new-era-in-competition-law)).

*Source:* Survey on the implementation of the Recommendation concerning Effective Action against Hard Core Cartels (OECD, 2017<sup>[9]</sup>).

In addition to challenges regarding the coverage of national definitions of hard core cartels, in jurisdictions where there is need to prove the cartel’s effects on the market the successful bringing of enforcement action against cartels is challenging. For example, as Swiss laws do not prohibit cartels per se, the Swiss Competition Commission (COMCO) has to prove in each case that the hard core cartel significantly restricts competition. This requirement was partly overcome by case law which settled how the seriousness of the restraints on competition should be assessed and whether sanctions could be imposed in the case of hard core agreements that harm, but do not eliminate, effective competition. Specifically, the Swiss Federal Supreme Court provided important clarifications for the application of the Cartel Act by COMCO and the courts in the case of Gaba/Elmex (BGer 2C\_180/2014, 28 June 2016). In its response to the Survey, COMCO reported that this “judgment will facilitate COMCO’s proceedings against hard horizontal cartels as well as price fixing agreements and market foreclosures in distribution agreements, because COMCO will no longer have to prove the implementation and effects of such agreements in each individual case on the basis of quantitative criteria. The Federal Supreme Court, however, has not prohibited such agreements per se. They may still be justified on grounds of economic efficiency, *provided the statutory presumption that (effective) competition will be eliminated can be rebutted*”.

## 3.2. Conclusions and steps forward

Since the adoption of the Recommendation, the fight against cartels has picked up among Adherents.

Most respondents find the Recommendation’s definition sufficiently comprehensive and valid.

The Recommendation could recommend that the legal standard for establishing a hard core cartel (versus other types of anti-competitive agreements) could be relaxed, by dispensing with the need to prove the anticompetitive effects of hard core cartels and making them by

definition illegal (OECD, 2003<sup>[10]</sup>). A lower legal standard would enable companies and individuals to better identify and avoid conduct that would put them at risk of infringing the law. Applying a *per se* prohibition of cartels would also facilitate criminal enforcement, which usually relies on proving a criminal conduct “*beyond a reasonable doubt*”. Thus, in the absence of a *per se* rule against hard core cartels, criminal enforcement authorities could be faced with the task of proving anticompetitive effects on the market beyond a reasonable doubt.





## Chapter 4. Exemptions and defences

### 4.1. Background and developments

The Recommendation excludes from its definition of hard core cartels agreements, concerted practices or arrangements that (a) may bring about a reduction of costs or an increase of output; (b) are excluded from the coverage of national laws on cartels; or (c) are authorised in accordance with national laws.

The Recommendation goes on to set conditions for exempting or authorising conduct that would otherwise fall under the definition of hard core cartels. Specifically, exclusions and authorisations need to be transparent, necessary and narrow (i.e., no broader than necessary to achieve their objective), and periodically reviewed to assess whether these conditions are still met. Both sectoral regulation that exempts the sector from the application of competition law, as well as narrower, individual exemptions for specific categories of conduct, would need to follow these conditions.

According to 27 Survey respondents, their competition law regimes do not have any exemptions from the coverage of the laws on hard core cartels.

The Recommendation mentions that Adherents should notify the OECD annually of new or extended authorisations or exclusions from the application of competition laws of agreements or practices that might otherwise violate provisions against cartels. The Competition Committee is instructed to maintain a record of exclusions and authorisations notified to the OECD. However, the Competition Committee was never notified of any such exemptions; hence no registry was created.

Since the adoption of the Recommendation, OECD roundtables examined exemptions from the application of competition law afforded to specific types of conduct which could qualify as hard core cartels, like export cartels (OECD, 2012<sup>[11]</sup>) (OECD, 2015<sup>[12]</sup>), and defences that parties can claim, e.g. in cases of crisis cartels (OECD, 2011<sup>[13]</sup>), or when cartel-like conduct is mandated by regulation (OECD, 2011<sup>[14]</sup>).

#### 4.1.1. Export cartels

An export cartel is an agreement or arrangement between firms to charge a specified export price and/or to divide export markets (OECD, n.d.<sup>[15]</sup>).

Several jurisdictions explicitly exempt export cartels from the application of their domestic cartel laws, usually on the condition that the cartel does not lead to injurious effects on competition in the domestic market, e.g. by reducing exports. Some require notification of such activities and a few others require official authorisation (OECD, 2012<sup>[11]</sup>). Competition laws in other jurisdictions do not explicitly exempt export cartels, but are limited in scope to cartel conduct that has an effect within the domestic territory. In such cases, the legal status of export cartels may be more ambiguous, since domestic consumers could theoretically be harmed by an export cartel affecting goods which are later incorporated into final products imported into the jurisdiction. However, even authorities

with jurisdiction over export cartels would not, in principle, give priority to or take action against cases of pure export cartels (OECD, 2015<sup>[12]</sup>).

Export cartels that fix prices or share markets are akin in objective and effect to any other cartel agreement (and thus would be normally considered a violation of competition law if it were not for their extra-territorial effects), the difference being that only foreign consumers are harmed (OECD, 2017<sup>[16]</sup>). The rationale for permitting export cartels is that this may facilitate co-operative penetration of foreign markets, transfer income from foreign consumers to domestic producers and result in a favourable balance of trade (OECD, n.d.<sup>[15]</sup>).

Export cartels can, of course, be captured by the laws of import jurisdictions, where the harm is felt – provided said jurisdictions have laws against cartels. However, the explicit or implicit exemption of export cartels from domestic antitrust laws may protect those cartels from being caught by competition authorities in the importing jurisdictions. These authorities may have difficulties obtaining non-public evidence concerning export cartels, as the conduct will not have been investigated in the cartel's home jurisdiction. In particular, in the case of export cartels explicitly exempted from the application of the domestic competition law, the competition authority of the export jurisdiction (which would have, in principle, better access to the cartelists and to information about the conduct) may be unable to assist its peer authority even upon request. Specifically, if the alleged conduct is legal in the jurisdiction where the cartelists are based, the home competition authority may lack the legal means to investigate the conduct and be unable to share information with jurisdictions where that conduct is illegal (OECD, 2012<sup>[11]</sup>).

Permitting export cartels, which benefit domestic producers at the expense of foreign consumers, can undermine a country's ability to advocate for fighting international cartels (OECD, 2017<sup>[16]</sup>). Furthermore, permitting export cartels can hamper international co-operation efforts while providing firms with the relationships that could allow them to collude in domestic markets as well.

#### **4.1.2. Crisis cartels**

A crisis cartel is an agreement among most or all competitors in a particular market to restrict output and/or reduce capacity in response to a crisis in that industry (Fiebig, 1999<sup>[17]</sup>). The term crisis cartel has been used in two ways: a cartel formed during a sectoral, national, or global economic downturn involving declining demand and excess capacity, *without* state permission or legal endorsement; or a cartel that national competition law *allows* or a government *permits* during such downturns (OECD, 2011<sup>[13]</sup>). The second use of the term thus refers to cartels immune from competition law enforcement.

Firms may have an incentive to agree to reductions in capacity or engage in price-fixing to limit the negative impact on profits of economic and financial crises or recession. This has implications for antitrust policy and raises the question of whether competition authorities should take a more lenient view of potential anti-competitive practices in such circumstances, or go as far as explicitly allowing a cartel, while firms adjust to the new environment. The counterview is that a lax approach to such anti-competitive practices may inhibit the more competitive firms' ability to adjust and hence prolong the economic downturn, whereas the strict enforcement of competition principles will benefit consumers and the economy in general and aid economic recovery (OECD, 2011<sup>[13]</sup>), (note by Steve McCriston).

#### **Box 4.1. Price-fixing during the 2008-2009 economic downturn: responses by competition authorities**

During the financial crisis of 2008 and 2009, some price-fixing cartels raised the argument that they were justified by the downturn, and should thus be allowed. The cases that follow provide a detailed analysis of how competition principles are applied and counter such arguments.

In 2008, the Hellenic Competition Commission (“HCC”) reviewed an agreement between the five biggest Greek fish farming companies that included quotas and price fixing for a type of fish. The industry sought to justify the agreement as a response to the financial crisis, required to rationalise production and restore the prices to a level that covers the production cost. The background was that, during the period 1990-2002, a lot of firms entered the market intending to take advantage of the opportunities of a rapidly growing and dynamic sector; in consequence supply increased above the level of demand and prices decreased dramatically. The HCC did not accept the industry crisis argument and held that the agreement constituted a hard core restriction of competition.

In 2001, the Irish Competition Authority won court proceedings in which it challenged the compatibility with EU and Irish competition law of an agreement between the ten principal beef and veal processors in Ireland to reduce capacity in the Irish beef processing industry. The background was a significant over-capacity in the Irish beef-processing industry in the late 1990s. The Irish Supreme Court referred a preliminary question to the European Court of Justice which ruled that the agreement was a hard core cartel, having as its object the prevention, restriction or distortion of competition (Case C-209/07, Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd., decision of November 20, 2008).

*Source:* (OECD, 2011<sup>[13]</sup>)

The merits of crisis cartels have not been sufficiently demonstrated, and there is no basis to revise the general presumption that hard core cartels should be disallowed, or reverse the trend towards stronger enforcement against hard core cartels. On the contrary, evidence suggests that crisis cartels have had limited success and significant costs, particularly given the risk of crisis cartels becoming permanent or used more frequently as a policy solution to economic downturns (OECD, 2011<sup>[13]</sup>).

#### **4.1.3. Regulated conduct**

When a conduct is required by regulation, firms can defend themselves from allegations of, and sanctions for, anti-competitive behaviour by invoking the mandating regulation as a defence, often called “regulated conduct defence” or “regulated conduct exemption”.

The exemption can be based on an explicit provision in the competition law itself or in another regulation, immunising specific categories of conduct or types of agreements between firms from the application of competition law. Exemption may vary, ranging from broad exemptions from competition law to narrow exemptions focused on particular situations and types of conduct (OECD, 2011<sup>[14]</sup>).

The regulated conduct defence can also be implied if competition laws and other regulations of equal import are inconsistent or conflicting and therefore cannot be both complied with at the same time.

As a general rule, the regulated conduct defence can be relied on when firm behaviour is mandated by regulation, so that the regulated firm has no discretion. Conversely, when regulations only allow or encourage (but do not dictate) the behaviour, which is then autonomously decided by the firm, antitrust enforcement is possible. Still, when regulation

encourages a firm to engage in anti-competitive conduct or creates a perception of immunity, this could be taken into account as a mitigating factor to reduce the sanction (OECD, 2011<sup>[14]</sup>).

#### **Box 4.2. Regulated defence case: the Italian National Council of Customs Agents**

Italian law required that the National Council of Customs Agents (CSND) set compulsory tariffs for customs agents. The CSND adopted such tariffs in 1988 and set some further conditions about the setting of prices in 1990. In 1993 the Commission adopted a prohibition decision (but did not impose a fine) in which it held that this was a restriction of competition and that the law could not hinder the application of EU competition rules.

The Court of First Instance (CFI) upheld this decision and rejected the regulated conduct argument invoked by the CSND (namely, that the CSND was a public body with regulatory powers and that it was obliged by law to set the tariffs for its members).

The CFI confirmed that *“if anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 [now articles 101 and 102] do not apply. In such a situation, the restriction on competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings”*.

In this case, however, national legislation did not lay down specific price levels or ceilings to be taken into account in establishing the tariff; nor did it define the criteria based on which that professional organisation was to draw up the tariff. Therefore, the CFI dismissed the regulated conduct defence, and ruled that *“to the extent to which such an organisation [the CSND] has room for manoeuvre in performing the obligations imposed on it by the national legislation within which it could and ought to have acted in such a way as not to restrict the existing level of competition, the restrictive effects on competition resulting from a tariff set by it may originate in its conduct”* (and cannot be attributed to the law). Therefore, the EU competition rules apply.

*Source:* Commission decision of 30.6.1993 (Case IV/33.407 – CNSD), OJ L 203, 13.8.1993; CFI judgement case T-513/93 judgement of 30.3.2000, CNSD v Commission (OECD, 2011<sup>[14]</sup>)

In a multi-jurisdictional context, the foreign sovereign compulsion doctrine is relevant. Under this doctrine, a party is exempted from liability for acts or failures to act which are compelled by a foreign government (OECD, 2011<sup>[14]</sup>), Submission by BIAC). Specifically, when private or public undertakings involved in anti-competitive conduct have no margin to act autonomously due to their duty to comply with local laws which conflict with foreign antitrust laws, they can be freed from antitrust liability.

## **4.2. Conclusions and steps forward**

The Recommendation provides conditions for exemptions to apply to conduct otherwise prohibited by competition laws: exemptions need to be transparent, necessary and narrow (i.e., no broader than necessary to achieve their objective). The Recommendation also stipulates that exemptions should be reviewed to assess whether they meet the conditions described above; new exemptions should be notified periodically to the OECD.

Of the exemptions discussed in this section, the explicit or implicit exemption of export cartels from the application of domestic cartel laws may be more problematic, as they benefit domestic producers at the expense of foreign consumers and can distort the level playing field among companies.

If the Recommendation is revised, it is worth considering whether the possible distortionary effect of export cartels should be mentioned, to emphasise the Adherents' commitment to competition on a level playing field. Also, it is worth considering omitting the clause on notification of exemptions to the OECD, as this system of notification and recording of exclusions was never used.



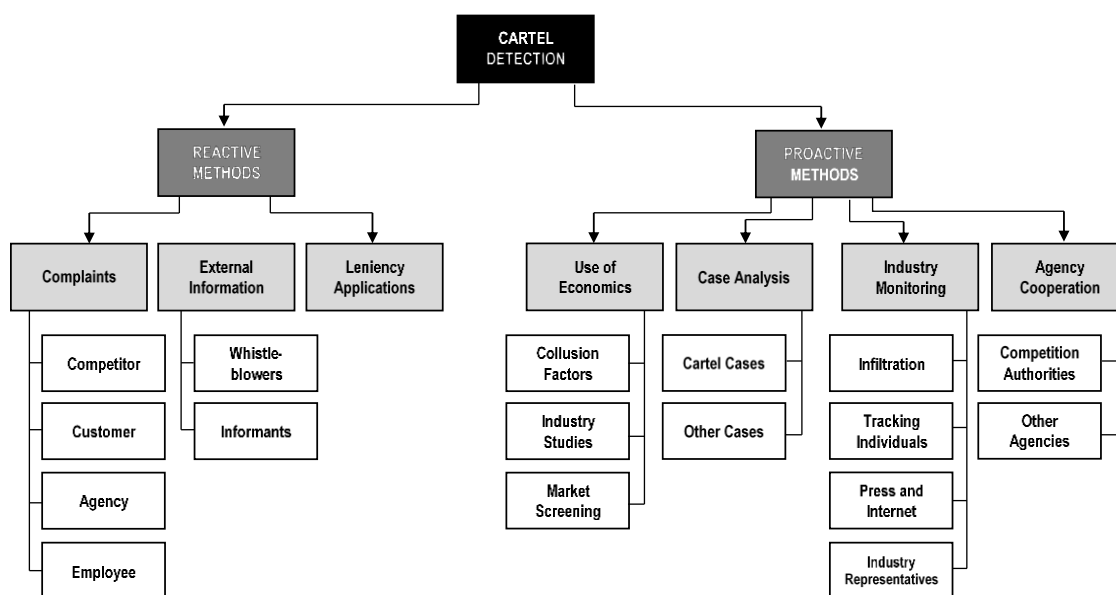
## Chapter 5. Detection of hard core cartels

### 5.1. Adequate detection powers

The Recommendation stipulates that competition laws of Adherents should provide for “enforcement procedures and institutions with powers adequate to **detect** and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance” [emphasis added]. The Recommendation does not explicitly mention specific detection tools for hard core cartel cases, such as leniency programmes or ex officio cartel detection methods. These tools to detect cartels were rarer when the Recommendation was adopted in 1998 but have since increased significantly in scope and variety.

In general, we can distinguish between reactive and pro-active detection tools. While reactive detection tools rely on information about potential cartels being brought to the attention of the competition agency by outside sources that are somehow involved in the cartel or have obtained information about it, pro-active methods involve competition agencies independently working to identify potential cartels or markets prone to cartelisation via active evaluation of a broad variety of information sources.

Figure 5.1. Pro-active and reactive methods of cartel detection



Source: Reproduced from (Hüschelrath, 2010<sup>[18]</sup>)

Since the Recommendation was adopted, there have been significant developments with regard to detection tools. These developments have been a frequent topic of OECD roundtables, hearings and reports.

## 5.2. Reactive detection tools – leniency

When we refer to “leniency” or “leniency programmes” in this report, the term includes amnesty programmes, which provide full immunity only to the first applicant, programmes which allow for full immunity to the first applicant as well as reductions in fines for subsequent applicants, and programmes which provide only partial immunity to the first applicant.

### 5.2.1. Developments 1998 - 2016

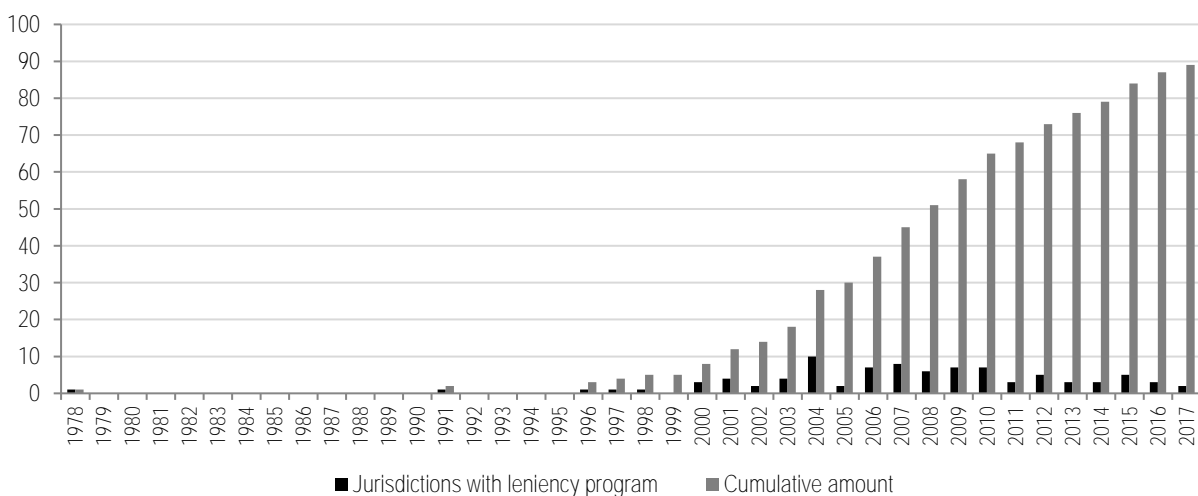
The most notable development in cartel enforcement in the last 20 years, since the Recommendation was adopted, is the introduction of leniency programmes in numerous jurisdictions. The developments in law, practice and OECD work are summarised below.

The 2000 Report on Hard Core Cartels (OECD, 2000<sup>[2]</sup>) mentions leniency programmes only in passing: “*The competition authorities of many other Member countries are beginning, considering, or at least interested in such programs.*” It suggests that the topic may warrant further study and “*perhaps the creation of “best practice” principles*”.

The uptake of leniency programmes since 2000 was impressive. At that time, only the United States, Canada, the European Commission, the United Kingdom, Germany and Korea had already introduced such programmes (OECD, 2002<sup>[19]</sup>). In 2003, Australia, Brazil, Czech Republic, France, Ireland, the Netherlands, Sweden, and Switzerland had also either recently introduced a leniency programme or were in the process of doing so (OECD, 2003<sup>[3]</sup>). Austria, Hungary, Israel, Japan, Mexico and Turkey joined the list of countries in the process of introducing leniency programmes in 2005, whereas Canada and Korea were already reviewing their existing ones (OECD, 2005<sup>[4]</sup>).

OECD research has found that 89 leniency programmes are in place around the world. Specifically, all OECD Members, 4 OECD Key Partners (Brazil, India, People’s Republic of China -hereafter “China”- and South Africa), the European Commission and 48 non-Members<sup>1</sup> have leniency programmes.

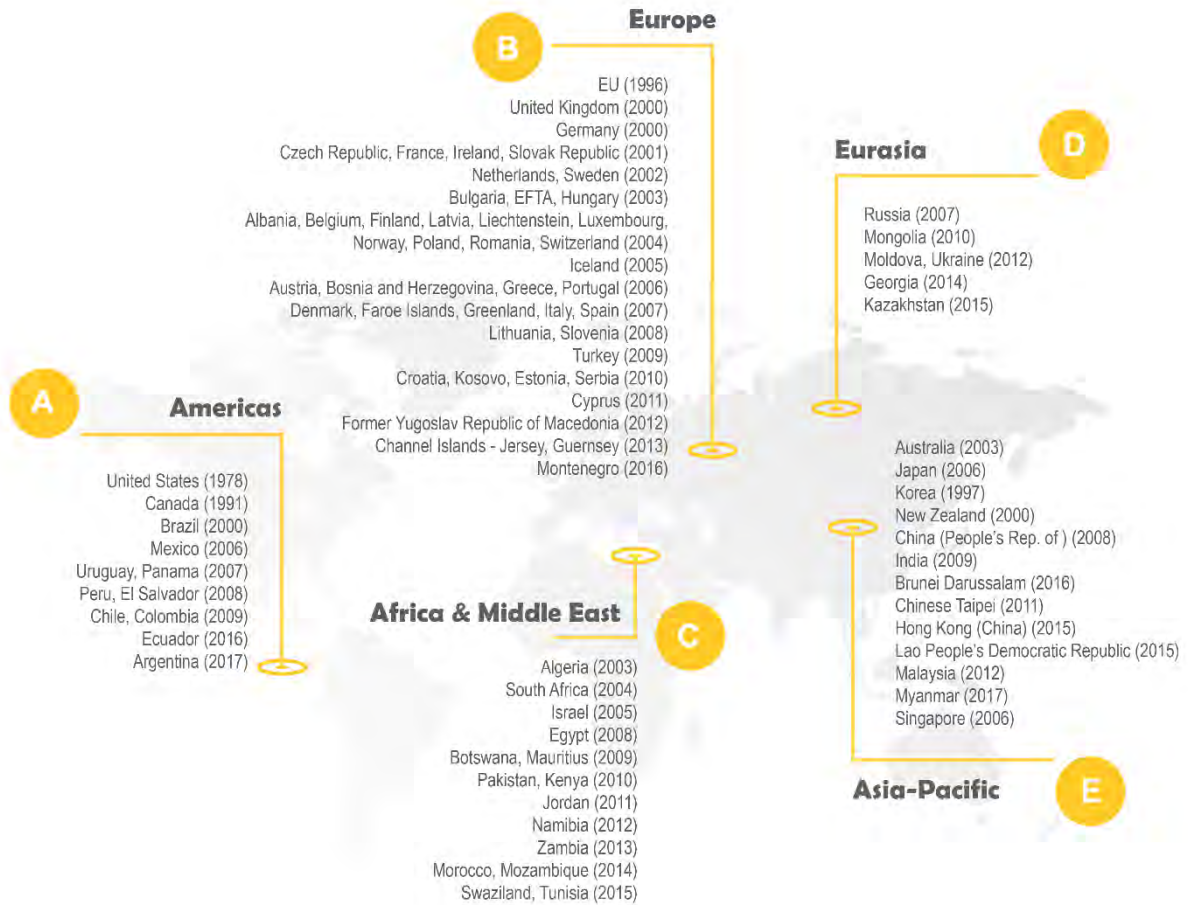
**Figure 5.2. Leniency programmes by year of introduction**



Source: OECD research



Figure 5.3. Introduction of leniency programmes by region



Source: OECD research

### Box 5.1. Reliance on leniency programmes

There are an enormous number of leniency applications across the globe and many competition authorities depend on them to conduct cartel investigations, as the following numbers show.

**European Union** – Between May 2004 and May 2014, the European Commission adopted 52 cartel decisions. At least one undertaking had applied for leniency in 94% of these cases. The percentage of cartel decisions in which full immunity was granted for the leniency applicant has increased: 10% (1 out of 10) in the 1996 – 2000 period; 61% (20 out of 33) in the 2001 – 2005 period; 81% (25 out of 31) in the 2006 – 2010 period; and 91% (21 out of 23) in the 2011 – 2015 period. Only two cartel decisions were based on ex officio cartel investigations between 2011 and 2015, whereas many more cartel decisions were based on ex officio investigations before that.

**Japan** – Since the introduction of the leniency programme in Japan in January 2006, the JFTC has received 938 applications until the end of March 2016. From January 2006 to the end of 2015, the JFTC took legal measures in 130 cartel cases and granted either total immunity or reductions of fines in 103 cases out of the 130 (79.2%). Total immunity was granted in 70 cases (53.8%).

**Korea** – From 2005, when the leniency programme of the Korean Fair Trade Commission (KFTC) was revised, to 2014, 304 cartel cases had been detected, and in 184 cases (59.5%) total immunity or reduction of fines were granted.

**United States** – Prosecutions assisted by leniency applicants accounted for over 90% of the total commerce affected by all the cartels prosecuted by the US Department of Justice, the Antitrust Division from 1999 to 2012.

*Sources:* JFTC website, [www.jftc.go.jp/dk/seido/genmen/kouhyou/index.html](http://www.jftc.go.jp/dk/seido/genmen/kouhyou/index.html) (in Japanese); JFTC (2016), Secretary General's press conference on 24 February 2016, [www.jftc.go.jp/houdou/teirei/h28/1\\_3/kaikenkiroku160224.html](http://www.jftc.go.jp/houdou/teirei/h28/1_3/kaikenkiroku160224.html) (in Japanese)

KFTC (2016), 2015 Annual Report, [www.ftc.go.kr/eng/bbs.do?command=getList&type\\_cd=53&pageId=0301](http://www.ftc.go.kr/eng/bbs.do?command=getList&type_cd=53&pageId=0301)  
 Werden, G. J., Hammond, S. D., and Barnett, B. A. (2011), Recidivism Eliminated: Cartel Enforcement in the United States since 1999, before the Georgetown Global Antitrust Enforcement Symposium, 22 September 2011, Washington, D.C. [www.justice.gov/atr/file/518331/download](http://www.justice.gov/atr/file/518331/download) (accessed 20 October 2016)  
 Wils, Wouter. P. J. (2016), "The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years", World Competition: Law & Economics Review, Vol. 39, No. 3.(OECD, 2016[6])

Major criteria required for a strong leniency programme were identified (OECD, 2005<sup>[4]</sup>), such as:

- creating strong incentives for insiders to come forward by providing immunity or significant fine reductions;
- considering leniency for subsequent applicants ( (OECD, 2009<sup>[20]</sup>) and (OECD, 2012<sup>[21]</sup>)), as they can provide useful corroboration or new evidence;
- ensuring a credible risk of serious penalties (also (OECD, 2004<sup>[22]</sup>)), in order to incentivise co-operation in the first place. Cartel sanctions on individuals, in addition to sanctions on companies, are often considered a powerful incentive for individuals to reveal information about cartels and co-operate in investigations (OECD, 2003<sup>[23]</sup>);
- providing clarity, certainty and priority on the rules and procedures that apply;
- establishing high standards for the type and quality of information that qualifies for leniency to ensure that only new or additional evidence qualifies;
- ensuring continued co-operation of the leniency applicants throughout the cartel investigation;

- potential exclusion of coercers from the benefits of the programme;
- protections against disclosure of leniency statements;
- cross-border co-ordination of leniency programmes and the use of confidentiality waivers in cases of simultaneous leniency applications [also (OECD, 2004<sub>[22]</sub>)]. International co-operation in cartel cases will be greatly facilitated if applicants waive confidentiality in order to enable agencies that have received parallel leniency applications to co-operate and co-ordinate effectively [ (OECD, 2012<sub>[11]</sub>) and (OECD, 2014<sub>[24]</sub>)]. One important step on the way would be to remove inconsistencies across leniency policies. The Recommendation on International Co-operation consequently recommends that Adherents “*minimise inconsistencies between their leniency or amnesty programmes that adversely affect co-operation*”; and
- considering the creation of one-stop shop models for leniency or markers to address the uncertainty and complexity that the business community faces in light of the increasingly international parallel enforcement action (OECD, 2014<sub>[24]</sub>).

One specific facet of leniency programmes, markers, was discussed in 2014 (OECD, 2014<sub>[25]</sub>). A marker is a mechanism that allows prospective leniency applicants to approach the competition authority with initial limited information about a cartel, in exchange for a commitment by the authority to hold their place in the leniency line for a finite period. There is a significant degree of commonality in approaches to markers, but also differences among marker systems in different jurisdictions. These differences relate principally to the amount of information required for a successful marker application, the time granted to perfect the leniency application, the automatic or discretionary nature of the marker, the availability of markers for subsequent applicants and confidentiality in the marker process.

Discussions on leniency always recognised that leniency policies do not operate in a vacuum and need to appraise their interaction with criminal liability, settlement and early termination procedures (OECD, 2006<sub>[26]</sub>) as well as private damages actions (OECD, 2007<sub>[27]</sub>) and (OECD, 2015<sub>[28]</sub>).

- Leniency policies that are not aligned with possible parallel criminal procedures, for example in criminal prosecutions for bid rigging, might lack effectiveness if there are no corresponding opportunities for fine reductions in the criminal prosecution and the fines for individual offenders.
- Settlement and early termination procedures (see 7.3) can lead to fine reductions. When these reductions are significant and come close to leniency rewards, this can decrease incentives to apply for leniency.
- Private damages regimes that expose leniency applicants to a higher risk of being held liable, due to access to leniency materials or early termination of individual cases can weaken the appeal of leniency programmes significantly (OECD, 2018<sub>[29]</sub>).

### Box 5.2. EU Damages Directive and Leniency

The EU Directive on antitrust damages actions (2014/104/EU) incorporates several provisions to safeguard the integrity and incentives set by the Commission's and Member States' leniency programmes and settlement policies. The provisions of the Directive have to be transposed into national law by all Member States.<sup>2</sup>

**Article 6**, on the disclosure of evidence in the file of a competition authority, paragraph 6:

*Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:*

*(a) leniency statements; and*

*(b) settlement submissions.*

**Article 7**, limits on the use of evidence obtained solely through access to the file of a competition authority, paragraph 1:

*Member States shall ensure that evidence in the categories listed in Article 6(6) which is obtained by a natural or legal person solely through access to the file of a competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.*

**Article 11**, joint and several liability, paragraph 4:

*By way of derogation from paragraph 1, Member States shall ensure that an immunity recipient is jointly and severally liable as follows: (a) to its direct or indirect purchasers or providers; and (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.*

Source: EU Directive on antitrust damages actions; <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN>.

The reviews on competition law and policy (“peer reviews”)<sup>3</sup> for Members and non-Members, as well as the accession reviews always assess a jurisdiction’s capacity for effective cartel detection and enforcement and put strong emphasis on leniency programmes.

- For Latin America, a series of peer reviews was undertaken since 2003<sup>4</sup> and the implementation of the recommendations was monitored (OECD, 2012<sub>[30]</sub>). Eight of the nine countries reviewed currently have immunity and leniency programmes. Brazil already had a leniency programme in 2000, but most introduced these tools following the recommendations made in their respective peer reviews (Chile 2003, Mexico 2004, Argentina 2007, El Salvador 2008, Peru 2008, and Colombia 2009). Honduras was empowered in 2015 to create a leniency programme, as recommended in its 2011 peer review. Costa Rica does not yet have a leniency programme. The Competition Committee’s accession review of Costa Rica as part of its roadmap for accession recommended introducing one (OECD, 2016<sub>[31]</sub>).
- The Competition Committee’s review of Colombia as part of its roadmap for accession (OECD, 2016<sub>[32]</sub>) recommended that Colombia should modify its leniency programme by (i) deleting the statutory requirement that a leniency recipient should not be “the instigator or promoter” of the conspiracy, (ii) extending leniency benefits to individuals who reveal that they facilitated anti-competitive conduct by an associated enterprise; (iii) according permanent statutory protection against disclosure to adverse third parties of the identities of leniency applicants

and the evidence submitted by them during the course of the investigation, and (iv) providing that the competition authority may not charge an individual who is the first leniency applicant with a competition law violation.

- The peer review of Denmark (which has a leniency programme since 2007) recommended considering whether introducing a marker system would make the programme more effective and encourage leniency applications (OECD, 2015<sup>[33]</sup>).
- The recommendations in the peer review of Romania focused on a better and more systematic co-ordination with criminal prosecutors, as the Romanian authority's administrative leniency programme and immunity from criminal prosecution are not co-ordinated (OECD, 2014<sup>[34]</sup>).
- The peer review of Ukraine (OECD, 2016<sup>[35]</sup>) recommended that subsequent applicants should be rewarded for co-operation with a reduction of fines.

All of the topics are still highly relevant and competition authorities strive actively to improve their leniency programmes further, to increase their attractiveness and effectiveness and to facilitate international co-operation in cross-border cartel cases.<sup>5</sup>

In addition to the discussions held at the various OECD fora, the International Competition Network (ICN) has been very active in promoting best practices with regard to leniency programmes. It has published a “training on demand”-module on leniency (ICN Training on Demand Leniency<sup>[36]</sup>), a “Checklist for Efficient and Effective Leniency Programmes” (ICN Checklist Leniency<sup>[37]</sup>), and chapter 2 of the ICN Anti-Cartel Enforcement Manual (ICN Manual Leniency, 2014<sup>[38]</sup>) covers “*drafting and implementing an effective leniency policy.*”

The European Competition Network (ECN) has last revised its ECN Model Leniency Programme in 2012 (ECN, 2012<sup>[39]</sup>). The European Commission has issued a “*Proposal for a Directive to empower the competition authorities of the Member States to be more active enforcers and to ensure the proper functioning of the internal market*” recently (ECN+ Directive). This proposal suggests transposing the main principles of the ECN Model Leniency Programme into national laws, thus ensuring that all national competition authorities can grant immunity and reduction from fines and accept summary applications under the same conditions.

### Box 5.3. Leniency in the ECN+ Directive

The ECN+ proposal recognises the need for cross-border legal certainty for applicants and states that divergences in Member States' leniency programmes still lead to different outcomes for applicants. To this purpose, chapter VI proposes to transpose the main principles of the ECN Model Leniency Programme into law, thus ensuring that all national competition authorities can grant immunity and reduction from fines and accept summary applications under the same conditions:

#### Article 17– Immunity from fines

- Stipulates the conditions for immunity that should be available to any undertaking that has not coerced others into the cartel, provided that it is the first to hand over the necessary evidence to uncover or prove an infringement.

#### Article 18 – Reduction of fines

- Outlines the conditions for fines reductions for undertakings that provide evidence with significant added value and/or evidence that leads to an increase in fines.

#### Article 19 – General conditions for leniency

- Lists additional requirements such as ending the involvement in the cartel; continuous and full co-operation; full disclosure of evidence; and non-disclosure of the leniency application to third parties, except other competition authorities.

#### Article 20 – Form of leniency statements

- Foresees that leniency statements shall be accepted in writing and that leniency statements shall also be accepted orally or in any way that permits applicants not to take possession, custody, or control of such submitted statements.

#### Article 21 – Markers for applications for immunity

- Provides for a marker system that secures a place in the queue for immunity and allows for a subsequent completion. The granting of the marker is to be at the discretion of the competition authority.

#### Article 22 – Summary applications

- Outlines conditions for the validity of summary applications. These apply in cases where a marker or a leniency application was filed with the European Commission and the national competition authorities whose territory is affected receive a short description (=summary application) of the cartel. In case the European Commission decides not to act on the case in whole or in part, the undertakings have the right to submit full applications which are deemed to have the same date as the initial marker or leniency application to the European Commission.

#### Article 23 - Interplay between immunity applications and sanctions on natural persons

- Requires Member States to ensure that individuals that co-operate fully and continuously will be protected from any criminal or administrative sanctions, under the conditions outlined in Article 23.

*Source:* Proposal for a Directive to empower the competition authorities of the Member States to be more active enforcers and to ensure the proper functioning of the internal market (ECN+ Directive), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0142>; Analysis of the final compromise text with a view to agreement <http://data.consilium.europa.eu/doc/document/ST-10033-2018-INIT/en/pdf> (accessed 7 September 2018). Provisional political agreement on the proposal was reached on 31 March 2018 by the European Parliament and the Council, adoption pending

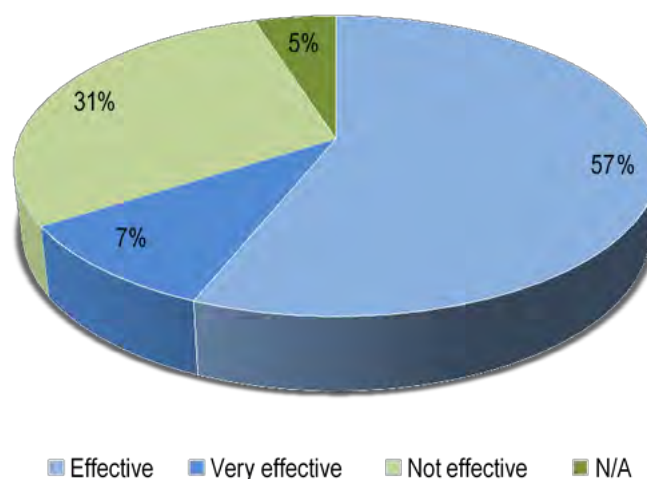
### 5.2.2. Results of the 2017 Survey on Leniency

The Survey (OECD, 2017<sup>[9]</sup>) sought to collect information about the availability, basic structure and frequency of use of leniency programmes in cartel cases. It also sought to identify challenges in their use.

Currently, 41 out of 42 respondents, with the exception of Costa Rica, have a leniency/amnesty programme for hard core cartels. All OECD Members and the European Commission have leniency programmes in place.<sup>6</sup>

As illustrated in Figure 5.4 the majority of respondents considered their leniency programme to be the single most effective tool for detecting cartels. This is confirmed by a large number of leniency applications and a high proportion of cartel cases detected through leniency in many jurisdictions. Responses also show increasing convergence of leniency programmes among respondents.

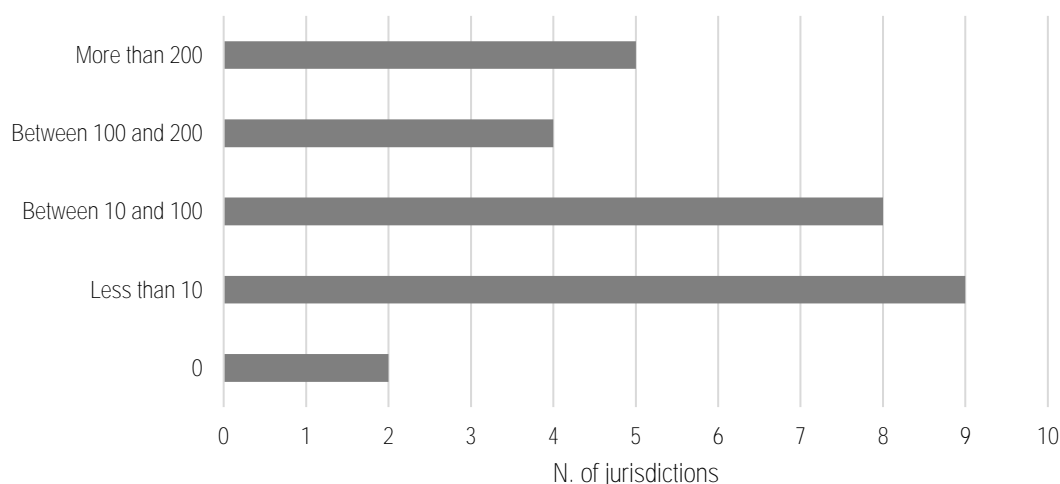
Figure 5.4. Evaluation of the effectiveness of leniency/amnesty programmes



Source: (OECD, 2017<sup>[9]</sup>)

Twenty-eight respondents provided details on the number of leniency applications or cases detected through leniency, and their responses offer a picture of the use of leniency programmes in various jurisdictions.

The percentage of cartel cases detected through leniency applications is reported in the range of **45-55%** for countries like **Canada, Chile, Germany, Korea** and **New Zealand**, while in the **European Union** this number goes up to **80%**<sup>7</sup>. These figures demonstrate the effectiveness of leniency programmes in some jurisdictions.

**Figure 5.5. Total number of leniency applications received by 28 respondents, 2011-2016**

Source: (OECD, 2017<sup>[9]</sup>)

Even though leniency programmes are reported to be working well in many jurisdictions, respondents also mentioned challenges. These include: a lower-than-hoped number of leniency applications in some jurisdictions; poor awareness of competition and leniency procedures in the country; inefficient and opaque procedural steps to apply for and receive leniency; and low incentives to co-operate with competition authorities. More broadly, many respondents identified a need to improve the effectiveness of their system.

Some agencies put forward reasons for which their leniency programmes have not been working as effectively as hoped. For example, **Mexico** underlined that the leniency programme would be more effective if leniency applicants benefitted from an exemption (or reduction) of damages awarded in private damages claims. **Finland** also mentioned that risks linked to private enforcement against leniency applicants could lessen the incentive to apply for leniency.

Agencies gave a number of reasons why leniency programmes have not met expectations. A lack of benefits to leniency applicants in private damages actions or a higher risk of being exposed to them was mentioned. Similarly, an insufficient harmonisation of the criminal consequences for individuals involved in bid rigging with the leniency programmes was thought to decrease incentives for leniency applications. Other adverse incentives mentioned in the responses included the lack of strong cartel enforcement in the first place, or the perceived low level of fines for cartel offences, often as a direct consequence of court decisions to lower fines set by competition authorities.

Several jurisdictions have taken, or are currently undertaking, measures in order to improve their leniency procedures and make co-operation between companies and agencies better. **Australia** reviews the Australian Competition and Consumer Commission's (ACCC) Immunity & Cooperation Policy for Cartel Conduct to assess its suitability to incentivise parties to co-operate. **Japan** is considering introducing a system that would allow the Japan Fair Trade Commission (JFTC) to increase or decrease fines according to the quality of the co-operation of the leniency applicants with the agency during the investigation.



**Croatia** is considering introducing summary leniency applications.<sup>8</sup> **Lithuania** is in the process of updating its rules in order to increase predictability and transparency of its leniency programme, as well as enhance co-operation between applicants and the competition agency.

With regard to the confidentiality aspects of leniency documents, **Brazil's** CADE has been working on a draft resolution, currently under public consultation, “*that aims at regulating the potential judicial access of documents obtained by means of Leniency Agreements and Cease and Desist Agreements*”.

### 5.3. Other reactive detection tools

As shown in Figure 5.1 above, there are more reactive detection tools than leniency. Most of them have traditionally been and are still used by competition authorities. Complaints from various sources can, either on their own or in combination with complementary information, trigger investigations and provide a sufficient basis for searches.

Complaints, as shown in Figure 5.6 constitute the largest group of triggers for ex officio investigations. The sources for this kind of information are manifold and can range from customers or suppliers of a cartel, journalists, disgruntled employees or acquaintances of cartel members. All competition authorities receive complaints and they can prove useful. One of the prerequisites for complaints is public awareness of the existence of the competition authority and the illegality of cartels. Often tip-offs for new cases are generated by media reports on other cartel cases. This underlines the importance of cartel-related advocacy (see section Chapter 11. on Cartel related advocacy).

A notable development identified in the last decade is the implementation of whistle-blower systems in several jurisdictions to allow outside informants to anonymously come forward (outside the context of leniency applications). This anonymity can alleviate fears among informants of negative consequences of exposing cartels, such as job losses, professional reputational damage or other kinds of retaliation by exposed cartelists.

Hungary’s competition agency (GVH) introduced the “Cartel Chat” in 2015.<sup>9</sup> Germany offers an anonymous informant system since 2012, the “*whistle-blower hotline*”<sup>10</sup>. The Spanish competition agency CNMC also has a whistle-blower system in place.<sup>11</sup> The United Kingdom has had a cartels hotline in place since 1995 and a reward scheme since 2008.<sup>12</sup> Canada introduced a criminal cartel whistle-blowing initiative in 2015 in order to increase the quality and quantity of whistle-blowing reports, as well as the number of cartels detected outside leniency applications.<sup>13</sup> Similarly, Romania introduced its anonymous whistle-blowing tool in 2015.<sup>14</sup> The European Commission started its anonymous whistle-blower tool in 2017.<sup>15</sup> The agencies expect that the tools will complement their leniency programmes and thus increase the detection rate and therefore deterrence.

Whistle-blower programmes are designed to encourage informants wishing to come forward but reluctant to disclose their identity. One of the main challenges of anonymous complaints used to be the impossibility to verify and/or clarify information, as the communication was only one way, from the complainant to the authority. Web-based hotlines solve this issue. They are easily accessible on the competition authorities’ websites<sup>16</sup> and informants can be contacted by the competition authorities without disclosing their identity. The communication cannot be traced back to a certain computer or person. The anonymity helps in developing a two-way communication starting with an electronic message which, with the support of the competition authority, can lead to the

submission of additional evidence. The informants can always choose to disclose their identity at any stage or to withdraw from the communication. Informant reward programmes that some authorities offer provide additional incentives to approach the authority.

#### Box 5.4. The German Business Keeper Monitoring System

The German Bundeskartellamt introduced an anonymous whistle-blower hotline, the Business Keeper Monitoring System (BKMS)<sup>1</sup> in 2012. The BKMS is an internet-based communications platform for informants that is also used by the law enforcement and the prosecution authorities of several federal states, as well as by large, private companies to combat internal corruption and economic offences. The system guarantees the anonymity of informants while still allowing for continuous **reciprocal communication with investigative staff** at the Bundeskartellamt. This can be done via a secure electronic mailbox, which can be set-up by informants themselves to share written submissions and file attachments with the Bundeskartellamt.

More than 1300 tip-offs with some relevance were posted on the whistle-blowing system's homepage since 2012 and investigations have been conducted in a large number of cases based on tip-offs fed into the whistle-blowing system. In several cases, the Bundeskartellamt carried out dawn raids to validate the tip-offs received.

In June 2015, the Bundeskartellamt imposed fines totalling approximately EUR 75 million on five manufacturers of acoustically effective components for cars for having concluded illegal agreements for the supply of such components to the automotive industry.<sup>2</sup> This was the first case triggered by an anonymous tip-off to the Bundeskartellamt's electronic whistle-blowing system, which was concluded with fines.

Notes:<sup>1</sup> [https://www.bundeskartellamt.de/EN/Banoncartels/Whistle-blower/whistle-blower\\_node.html](https://www.bundeskartellamt.de/EN/Banoncartels/Whistle-blower/whistle-blower_node.html)

<sup>2</sup> [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/24\\_06\\_2015\\_Automobilindustrie.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/24_06_2015_Automobilindustrie.html)

Source: (Sauer and Schirra, 2017<sup>[40]</sup>)

#### 5.4. Pro-active detection methods

*Pro-active* investigations include investigations initiated as a result of: (i) data screening (e.g., analysis of economic data or firm behaviour by competition authorities); (ii) monitoring publicly available information; (iii) private enforcement actions; (iv) other pro-active cartel detection methods. In contrast to reactive detection tools such as leniency that trigger a cartel investigation, or whistle-blowing hotlines, these detection tools are based on a pro-active effort by competition agencies to identify possible infringements and to then start investigations on their own initiative (“*ex officio*”).

Pro-active methods are a necessary tool for agencies in jurisdictions where leniency programmes are not working effectively and which lack other outside information or tip-offs. Pro-active detection methods are also a necessary complement to reactive detection tools, even if an authority receives a constant stream of leniency applications or other outside information.

Information on alleged cartel infringements usually needs to be cross-checked in order to assess its plausibility and credibility. This is true for leniency applications as well as for third party complaints. On its own, information may be misleading or even be false – to harm a competitor for example. If a leniency application is however corroborated by a complaint or industry data, or industry data that raise concerns are confirmed by

substantiated complaints, this may strengthen the case and allow for subsequent investigation measures such as dawn raids.

An over-reliance on reactive detection tools like leniency may raise a number of policy concerns, too. An authority that mainly or solely relies on leniency risks losing a sense of its enforcement priorities. It may pursue reported cases but miss cases with a higher relevance to the economy. Even successful leniency programmes may not be as effective as expected. Theoretical work has suggested that leniency programmes do not detect sophisticated and profitable cartels as much as cartels that are no longer successful or stable, and are about to collapse anyway (OECD, 2013<sup>[41]</sup>). For these reasons, many competition authorities seek to detect cartels on their own initiative, in line with their enforcement priorities.

#### **5.4.1. Developments 1998 - 2016**

While the need to facilitate active cartel detection was recognised early on, this was mostly related to the detection of cartels based on information proactively obtained from other agencies (OECD, 2000<sup>[2]</sup>). Apart from this, most of the work has since focused on the detection of suspicious signs in public procurement tenders. The 2005 report on the implementation of the Recommendation (OECD, 2005<sup>[4]</sup>) identified public procurement officials as a vital source for information on bid rigging conspiracies and stated that *“programmes to systematically educate procurement officials exist only in a few member countries, while some other countries have more recently started to develop their own, more limited programmes.”* The 2007 Roundtable on Public Procurement (OECD, 2007<sup>[42]</sup>) found that competition agencies can help procurement agencies to identify signs of bid rigging at an early stage, but only a limited number of countries such as Canada, Switzerland, Sweden and the United States had developed checklists at the time to help procurement agencies spot instances of possible collusion. In 2009 the OECD Guidelines for Fighting Bid Rigging in Public Procurement (OECD, 2009<sup>[8]</sup>) introduced a systematic approach to help public procurement officials prevent and detect bid rigging in public tender procedures.

### Box 5.5. The OECD Guidelines for Fighting Bid Rigging in Public Procurement

The OECD Guidelines for Fighting Bid Rigging in Public Procurement (OECD, 2009<sup>[81]</sup>) were adopted by the Competition Committee in 2009, and are included in the 2012 Recommendation of the Council on Fighting Bid Rigging in Public Procurement [[OECD/LEGAL/0396](#)]. The Guidelines include a specific checklist on how to detect bid rigging during the procurement process. The checklist recommends that procurement officials remain vigilant for:

- warning signs and patterns when businesses are submitting bids (e.g. the same supplier wins all tenders)
- warning signs in tender documents submitted (e.g. identical mistakes)
- warning signs and patterns related to pricing (e.g. large differences between the winning bid and other bids)
- suspicious statements (e.g. spoken or written references to an agreement among bidders)
- suspicious behaviour (e.g. suppliers holding regular meetings).

The Recommendation also suggests that competition authorities partner with procurement bodies to provide training and to raise awareness and to establish a relationship that facilitates the reporting of suspicious tender signs.

The 2010 Roundtable on Collusion and Corruption in Public Procurement (OECD, 2010<sup>[43]</sup>) and the 2014 Global Forum discussion on Fighting Corruption and Promoting Competition (OECD, 2014<sup>[44]</sup>) recognised the substantial benefits to a co-ordinated approach between various national enforcement agencies, in terms of enhancing detection and prosecution effectiveness for corruption and collusion offences.

The 2016 report monitoring the implementation of the 2012 Recommendation of the Council on Fighting Bid Rigging in Public Procurement [ (OECD, 2016<sup>[45]</sup>) ] found that “*most Members and Partners of the Competition Committee have developed guidelines and awareness materials, like brochures and newsletters, addressed to procurement officials to help them design tenders so as to avoid bid rigging as well as be able to identify and flag possible signs of collusive behaviour.*” In addition to developing materials, almost all competition authorities who responded to the 2015 survey on the implementation of the Recommendation of the Council on Fighting Bid Rigging in Public Procurement reported that they carried out training activities (OECD, 2016<sup>[45]</sup>).

The 2013 Roundtable on *ex officio* cartel investigations (OECD, 2013<sup>[41]</sup>) identified two general screening approaches: i) a structural approach, which includes the analysis of structural and product characteristics of a specific market or industry that make successful collusive strategies more likely; and ii) a behavioural approach, which includes the identification through screening of firms’ behaviour or market outcomes that may be the outcome by a collusive strategy. The discussion found that a combination of structural and behavioural screens is the most effective approach to cartel screening. At the time the Dutch and UK competition agencies were found to have used structural screens, while Mexico, Korea, Italy and Brazil had implemented behavioural screens on a systematic or on a case by case basis.

The OECD held a workshop on cartel screening in the digital era in January 2018.<sup>17</sup> Brazil presented its “Cérebro” screening tool,<sup>18</sup> that is used to screen and mine data, check for red flags and run statistical tests in order to trigger *ex officio* investigations, support ongoing investigations and deliver intelligence to all units of CADE. In 2017, the UK Competition

and Markets Authority (CMA) has launched a cartel screening tool<sup>19</sup> that enables public procurement offices to enter tender related information into a screening software. The screening criteria are adjustable; the software tool will indicate suspicious signs that warrant further review. The CMA reports that currently 29 other national competition agencies are reviewing the tool to see if it would be fit for their use. The Swiss Competition Commission (COMCO) reported<sup>20</sup> on its experience with screening for suspicious cartel behaviour based on a number of simple screens. COMCO concludes that simple screens produce reliable results at least for the construction industry in Switzerland.

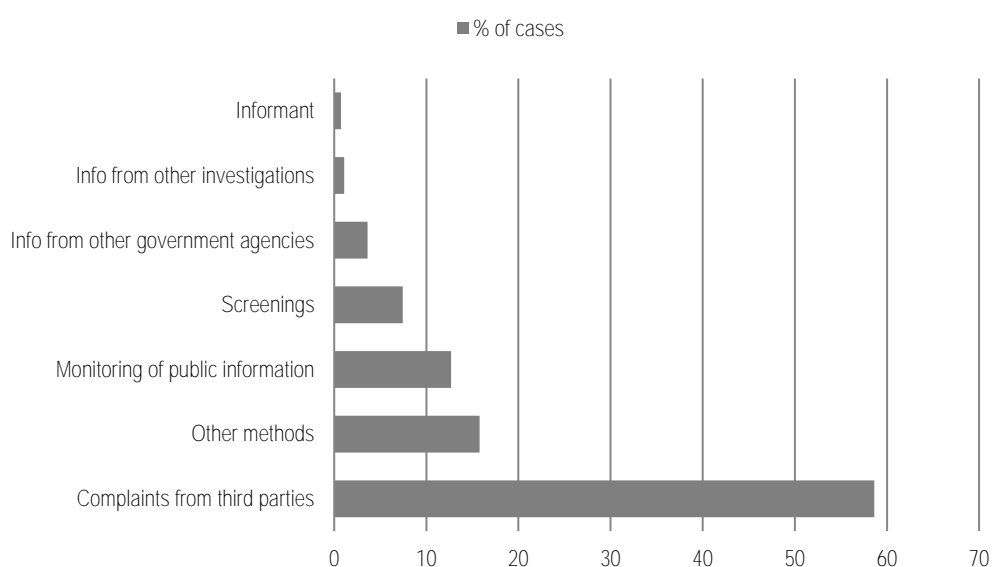
Similar work is ongoing within the ICN. A webinar on *ex officio* investigations was held on 24 January 2018 and Chapter 4 of the Anti-Cartel Enforcement Manual on Cartel Case Initiation lists in detail pro-active cartel detection tools.<sup>21</sup> Chapter 10 focuses on relationships between competition agencies and public procurement bodies.<sup>22</sup>

### 5.5. Results of the 2017 Survey on *ex officio* investigations

The Survey (OECD, 2017<sup>[9]</sup>) included questions on level of use, and success of, the different methods of *ex officio* investigations, as well as challenges faced and possible improvements.

**Figure 5.6. Sources of *ex officio* investigations**

Percentage of *ex officio* investigations per their source, out of all *ex officio* investigations. Numbers provided by 27 respondents for the period 2011-2016.



*Note:* When multiple sources were used in the same cartel investigation the case is counted under each category, i.e. more than once.

*Source:* (OECD, 2017<sup>[9]</sup>)

Many respondents acknowledged the importance of increasing *ex officio* investigations and avoiding an overdependence on leniency applications as a means to detect cartels. *Ex officio* investigations not only help unearth cases but also strengthen leniency programmes by increasing the threat of detection, and are thus crucial for effective enforcement against cartels.

As illustrated in Figure 5.6, respondents reported having detected cases through a variety of cartel detection methods, such as, in descending order: other methods (most likely complaints or tip-offs), the monitoring of publicly available information, screening of available data, information from other governmental agencies, or from other investigations.

Twenty-six respondents have provided the number of their *ex officio* investigations since 2011. There is substantial variation among countries in terms of the number of cases and detection methods. The percentage of *ex officio* investigations to all cartel investigations is normally higher in jurisdictions which reported receiving a low number of leniency applications, while such percentage is lower in jurisdictions with effective leniency programmes.

Responses indicate a trend towards close co-operation with other domestic governmental agencies (in particular public procurement agencies), to increase and improve *ex officio* cartel detection. The **Italian** competition authority considers co-operation with other institutions, including public procurement authorities, the judiciary (in the case of criminal investigations) and the Italian Anticorruption Authority to be particularly effective for cartel detection.

The **Australian** competition authority relies on its intelligence function to increase cartel detection, as well as on advocacy and outreach work with national and state agencies, which might come across useful evidence of cartel conduct. An education and outreach initiative has also been implemented for procurement officials, the Australian Federal Police, and anti-corruption officials.

**Canada** has several programmes to increase *ex officio* investigations, such as a dedicated information centre, outreach to procurement officials, businesses and legal communities, partnerships with police forces, and proactive monitoring by Canadian Competition Bureau employees. A tip line has also recently been introduced, with the aim of electronically collecting information which will be shared in real time among organisations (the Bureau, the federal police and the procurement authority).

The Competition Council of **Lithuania** recently signed a trilateral co-operation agreement with the public procurement office and the Special Investigations Service, aimed at providing mutual assistance and sharing essential information on investigations.

In 2012 **Colombia** launched an IT forensics laboratory to acquire, process and analyse digital evidence, thus helping the agency to increase the number of *ex officio* investigations.

In **Switzerland**, COMCO developed a bid rigging screening tool. COMCO notes that although the screening method proved to be successful, it is a resource-intensive and time-consuming process. Thus *“in order to improve the availability of data for further applications of a screening, COMCO has recommended, during the revision of the procurement law, that the law should include an obligation for public procurement authorities to keep data during a certain period of time”*.

**Sweden’s** competition authority has finalised a project to assess the feasibility of proactively detecting cartels with the use of economic analysis of procurement data.

As the majority of responses show, many competition authorities keep developing new ways and tools to detect more cartels actively. *Ex officio* investigations and pro-active detection methods provide a useful complement to, and help strengthen, leniency programmes.

## 5.6. Conclusions and steps forward

The **implementation of leniency programmes** in all OECD Members, and almost all Partners, is the most remarkable development in terms of enforcement of competition laws against cartels in the last 10 years. Forty-one out of 42 Survey respondents have in place a leniency programme, and consider it the most effective tool for detecting and prosecuting cartels. Still, some competition agencies, especially newer or smaller ones, report receiving a lower than expected number of leniency applications.

**A large number of investigations are initiated ex officio and on the basis of pro-active detection methods.** These investigations are initiated at the relevant authorities' own discretion relying on a variety of sources, such as anonymous tip-offs, publicly available information; screening of available data (like public procurement data); information from other investigations; and information from other governmental agencies. Whenever the topic was discussed at the OECD, there seemed to be widespread consensus that leniency programmes need to be complemented by pro-active cartel detection strategies in order to reduce the dependence on leniency and third party information, and maintain a credible threat to cartel stability. The case for pro-active detection is stronger in jurisdictions where leniency has not gained sufficient traction so far, but is increasingly recognised as a necessary complement to successful leniency regimes as well.

**Public procurement data** has become more easily accessible with the increase in e-procurement, and progress in data collection technologies. Thus, public procurement markets are the most frequent target for competition authority data screening methods (on a case-by-case basis or in a more systematic way) to find information that can trigger a cartel investigation or support an on-going investigation.

A number of competition agencies have also introduced **whistle-blower tools** that allow an anonymous, two-way communication between the informant and the competition agency.

The fact that the Recommendation does not mention leniency programmes, ex officio investigations or whistle-blowing programmes at all is conspicuous, given their importance in today's enforcement activities against cartels, and the fact that they have become fundamental features of an efficient enforcement framework. The Recommendation should be revised to acknowledge these developments.

Some Survey respondents suggested also adding to the Recommendation the main elements of leniency programmes to ensure convergence. The main elements that emerge from OECD roundtables and discussions are:

- Setting incentives for self-reporting by providing immunity to the first applicant that fully co-operates with the competition authority and fine reductions for subsequent applicants;
- Providing clarity on the rules and procedures governing leniency programmes and the related benefits;
- Facilitating reporting by using a marker system granting priority to early informants;
- Establishing clear standards for the type and quality of information that qualifies for leniency;

- Ensuring continued co-operation between the leniency applicant and the competition authority throughout the investigation, including by confidentiality waivers in parallel leniency applications;
- Considering the exclusion of cartel coercers from leniency programmes;
- Protecting leniency information against disclosure;
- Balancing leniency policies with settlements and private damages actions

## Notes

<sup>1</sup> Jurisdictions with leniency programmes include Romania (Associate in the Competition Committee) and all Participants to the Competition Committee, except for Costa Rica, Indonesia and Malta.

<sup>2</sup> All EU Member States have transposed the Directive [http://ec.europa.eu/competition/antitrust/actionsdamages/directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html)

<sup>3</sup> [www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm](http://www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm).

<sup>4</sup> [www.oecd.org/daf/competition/follow-up-of-nine-latin-american-competition-reviews-2012.htm](http://www.oecd.org/daf/competition/follow-up-of-nine-latin-american-competition-reviews-2012.htm).

<sup>5</sup> Roundtable on challenges and co-ordination of leniency programmes, <http://www.oecd.org/daf/competition/challenges-and-coordination-of-leniency-programmes.htm>.

<sup>6</sup> This includes Austria, Ireland, Israel, Latvia and Luxembourg, which did not reply to the Survey.

<sup>7</sup> This percentage differs from the one given in Box 5.1 (94 %), as the 80 % refer to a longer time period (2000 – 2016).

<sup>8</sup> If a full application has been filed with the European Commission, national competition agencies can grant provisional protection to the applicant on the basis of very limited information (ICC Leniency Manual, launch edition, April 2016. [http://www.iccgermany.de/fileadmin/user\\_upload/Content/Wettbewerb/ICC-Leniency-Manual-Launch-Edition.pdf](http://www.iccgermany.de/fileadmin/user_upload/Content/Wettbewerb/ICC-Leniency-Manual-Launch-Edition.pdf)).

<sup>9</sup> OECD-GVH Regional Centre for Competition in Budapest Newsletter January 2017, p. 13; [www.oecd.org/daf/competition/oecd-gvh-newsletter8-jan2017-en.pdf](http://www.oecd.org/daf/competition/oecd-gvh-newsletter8-jan2017-en.pdf).

<sup>10</sup> OECD-GVH Regional Centre for Competition in Budapest Newsletter January 2017, p. 10; [www.oecd.org/daf/competition/oecd-gvh-newsletter8-jan2017-en.pdf](http://www.oecd.org/daf/competition/oecd-gvh-newsletter8-jan2017-en.pdf).

<sup>11</sup> CNMC public e-mail for whistle-blowers; <https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/cnmc-hosted-annual-international-competition-network-icn-workshop-cartel-fighting-madrid>.

<sup>12</sup> [www.gov.uk/government/publications/report-anti-competitive-or-market-issues-to-the-cma](http://www.gov.uk/government/publications/report-anti-competitive-or-market-issues-to-the-cma).

<sup>13</sup> [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02819.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02819.html).

<sup>14</sup> [www.consiliulconcurentei.ro/ro/despre-noi/contact/contact-ccr.html](http://www.consiliulconcurentei.ro/ro/despre-noi/contact/contact-ccr.html).

<sup>15</sup> <http://ec.europa.eu/competition/cartels/whistleblower/index.html>.

<sup>16</sup> See for example: European Commission - <http://ec.europa.eu/competition/cartels/whistleblower/index.html>; German Bundeskartellamt - [www.bundeskartellamt.de/EN/Banonecartels/Whistle-blower/whistle-blower\\_node.html](http://www.bundeskartellamt.de/EN/Banonecartels/Whistle-blower/whistle-blower_node.html).

<sup>17</sup> [www.oecd.org/competition/workshop-on-cartel-screening-in-the-digital-era.htm](http://www.oecd.org/competition/workshop-on-cartel-screening-in-the-digital-era.htm).



<sup>18</sup> [www.slideshare.net/OECD-DAF/cartel-screening-in-the-digital-era-cade-brazil-january-2018-oecd-workshop](http://www.slideshare.net/OECD-DAF/cartel-screening-in-the-digital-era-cade-brazil-january-2018-oecd-workshop).

<sup>19</sup> [www.slideshare.net/OECD-DAF/cartel-screening-in-the-digital-era-uk-competition-markets-authority-january-2018-oecd-workshop](http://www.slideshare.net/OECD-DAF/cartel-screening-in-the-digital-era-uk-competition-markets-authority-january-2018-oecd-workshop).

<sup>20</sup> [www.slideshare.net/OECD-DAF/cartel-screening-in-the-digital-era-swiss-competition-commission-january-2018-oecd-workshop](http://www.slideshare.net/OECD-DAF/cartel-screening-in-the-digital-era-swiss-competition-commission-january-2018-oecd-workshop).

<sup>21</sup> [www.internationalcompetitionnetwork.org/uploads/library/doc628.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc628.pdf).

<sup>22</sup> <http://internationalcompetitionnetwork.org/uploads/library/doc1036.pdf>.



## Chapter 6. Investigative powers

The Recommendation stipulates that the competition laws of Adherents should provide for “enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance”. The Recommendation does not mention more specific investigation powers. Competition agencies, however, have always used a number of tools such as information requests, dawn raids, analysis of electronic evidence and oral statements to investigate and prove cartel cases.

### 6.1. Developments 1998 - 2016

The 2003 Report on the Implementation of the Recommendation [hereafter the “2003 Report” (OECD, 2003<sup>[3]</sup>)] looked at investigation tools in greater detail and identified **dawn raids** (surprise visits to the offices of suspected cartel participants to review and seize relevant files) as a preferred method in “virtually every country”. It describes how some countries require formal approvals by an independent court to obtain the authorisation to conduct a dawn raid, while others do not. The roundtable pointed out the need for meticulous preparation of dawn raids and careful handling of the evidence obtained to ensure its admissibility as proof for a violation, as well as most countries’ right to call upon the police or other law enforcement authority assistance in enforcing a search order. The importance of dawn raids was also underlined in the 2006 Roundtable on Prosecuting Cartels without Direct Evidence (OECD, 2006<sup>[46]</sup>), which noted that direct evidence of a cartel agreement has the highest probative value. Circumstantial evidence, be it communication or economic evidence, will often not meet the very high standards of proof which apply in particular in criminal enforcement regimes. Except for leniency, dawn raids are the best tool to obtain direct evidence, as well as supporting circumstantial evidence.

#### Box 6.1. Dawn Raids and Human Rights

The European Court of Human Rights has repeatedly ruled on the legality of dawn raids and seizures of documents and their conformity in particular with Art. 8 ECHR (right to respect for private and family life, for the home and for correspondence).

In the case *Janssen Cilag S.A.S. v. France* (application no. 33931/12, 13.04.2017), which concerned search and seizure operations carried out by the French competition authority, the Court observed that the searches carried out at the applicant’s premises had been aimed at gathering evidence of abuse of a dominant position and anti-competitive practices. The domestic judge had conducted an effective review of the applicant’s allegations and had applied the provisions of Article L. 450-4 of the Commercial Code in such a way as to ensure observance of the guarantees in a practical and effective manner. Accordingly, in view of the State’s margin of appreciation in this sphere, the Court considered that the interference had not been disproportionate and that a fair balance had been struck in the present case.

In a similar case, *Vinci Construction and GTM Génie Civile et Services v. France* (nos. 63629/10 and 60567/10, 2 April 2015), the Court held that the search and seizure of electronic data, consisting of computer files and the email accounts of certain employees in the applicant companies, amounted to interference with the latter's rights as protected under Article 8 of the Convention. That interference had been "in accordance with the law", since the inspections and seizures were governed by the Commercial Code and the Code of Criminal Procedure. Given that the search and seizure were intended to prove the existence of illegal agreements, they also had the legitimate aims of protecting the "economic well-being of the country" and "[preventing] disorder or crime", within the meaning of Article 8 § 2. As the inspections had been aimed at seeking evidence of possible anti-competitive practices, they did not therefore seem, in themselves, disproportionate with regard to the requirements of Article 8. However, safeguards provided by French domestic law, regulating inspections and seizures conducted in the area of competition law, had not been applied in a practical and effective manner in this case, particularly since it was known that the documents seized contained correspondence between a lawyer and his client, which was subject to confidentiality protection.

Source: Press releases ECHR 130 (2017), 13.04.2017 and 106 (2015), 02.04.2015; <https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=002-10474&filename=CEDH.pdf> and <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5055260-6217032&filename=003-5055260-6217032.pdf>.

The 2003 Report further emphasises that important evidence is likely to be found in electronic format and that most agencies have developed specialised procedures for searching and reproducing electronic files in dawn raids. It mentions that this may necessitate the search of private residences, where IT evidence may be stored, and the use of special IT staff or units.

The 2003 Report also notes that with the increasing degree of sophistication of cartels that leave less of a paper trail, oral testimony becomes more important and that most countries, but not all, can require natural persons to submit to interviews and provide statements. Limitations such as a low willingness of cartel offenders to co-operate in such a way and the privilege against self-incrimination that would be applicable in particular in criminal regimes can render oral testimony less effective however.

Another tool that was identified was electronic eavesdropping, but its use is limited to ongoing cartels and might be available only in criminal investigations.

OECD peer and accession reviews<sup>1</sup> always assess a jurisdiction's effective investigation powers against cartels.

- The monitoring review of the implementation of the recommendations in nine Latin American countries (OECD, 2012<sup>[30]</sup>) found that eight of the nine countries currently have dawn-raid and seizure powers (Chile, Peru, Mexico, Brazil, Argentina, El Salvador, Colombia and Panama) and that most introduced these tools following the recommendations made in their respective peer reviews. Honduras has not introduced dawn raid powers.
- In Costa Rica (OECD, 2016<sup>[31]</sup>), although a 2012 amendment gave the competition authority COPROCOM the power to conduct dawn raids, COPROCOM lacks sufficient human and technical resources to efficiently carry out such inspections.
- The peer review of Ukraine (OECD, 2016<sup>[35]</sup>) recommended to strengthen the competition authority's (AMC) investigation powers to enhance the AMC's ability to obtain evidence for competition law infringements. It was recommended that the AMC should not need the consent of the undertaking under investigation in order

to search for and seize evidence of competition law violations. Furthermore, it should not need the consent of individuals in order to question them, while respecting the right of individuals not to self-incriminate. The AMC should also be allowed to search and seize evidence from private premises. Penalties for economic entities who fail to comply with reasonable demands from the AMC for documents and other information should be increased.

- Kazakhstan’s competition authority should have the power to conduct unannounced inspections and issue mandatory information requests as well as the right to interview suspects and witnesses (OECD, 2016<sup>[47]</sup>).

The 2005 report on the implementation of the Recommendation (the “2005 report”) (OECD, 2005<sup>[4]</sup>) looked at enforcement tools from the angle of co-operation in international cartel investigations, and points at the first case of co-ordinated surprise inspections.

### Box 6.2. Co-ordinated Dawn Raids

In February 2003, for the first time an international cartel investigation was run simultaneously in four jurisdictions. The Canadian Competition Bureau, the European Commission, the Japanese Fair Trade Commission, and the Antitrust Division of the US Department of Justice conducted simultaneous searches related to suspected cartel activities related to heat stabilisers and impact modifiers, and co-ordinated the service of subpoenas and drop-in interviews.

In Europe, officials from the European Commission and Member States searched 14 companies located in 6 Member States as a part of these parallel efforts.

Overall, more than 250 investigators and agents were involved in the simultaneous launching of these investigations on three continents.

*Source:* (OECD, 2005<sup>[4]</sup>), p. 30

While in 2005 international co-operation on a global level was still mostly based on bilateral agreements or informal mechanisms, a small revolution had taken place in the European Union in 2003. Regulation 1/2003 of the Council<sup>2</sup> entered into force introducing substantial reforms for the co-operation of European competition authorities, including establishing the European Competition Network (ECN). The ECN comprises the competition authorities in EU Member States and the European Commission. Its objective is to agree on working arrangements and co-operation methods, provide a framework for information exchange and establish a dialogue between the different authorities so as to build a common competition culture. The Regulation, and the Commission notice based on it<sup>3</sup>, authorise the exchange of confidential information among competition authorities and enable competition authorities to request assistance of other competition authorities in investigations of suspected infringements of articles 101 and 102 (the main articles governing competition law) of the Treaty on the Functioning of the European Union, including investigations of suspected cartels. The objective is for national borders within the European Union not to be an obstacle to effective enforcement. The ECN facilitates the co-ordination of dawn raids and cartel investigations, as well as investigations on behalf of another EU Member State.

The challenges of globalisation for effective cartel investigations were addressed in subsequent discussions at the OECD, which looked at the co-ordination of investigative steps and strategy (OECD, 2012<sup>[11]</sup>) mechanisms for information exchange between agencies (OECD, 2013<sup>[48]</sup>) and legal instruments such as memoranda of understanding and

national law provisions (OECD, 2016<sup>[49]</sup>) (OECD, 2015<sup>[50]</sup>). This is dealt with in more detail in the section of this report on international co-operation.

The 2005 Report also noted that the efficient prosecution of cartels can also benefit greatly from a co-ordinated approach between various national enforcement agencies. This was looked into in greater detail in 2010 (OECD, 2010<sup>[43]</sup>) and 2014 (OECD, 2014<sup>[44]</sup>). Corruption investigations but also investigations into other fraudulent practices can generate important leads and the evidence obtained there may be used to prove competition offences as well, where compatible with national evidentiary rules.

### Box 6.3. Use of evidence obtained outside competition investigations

In two judgments of 9 July 2015, the *College van Beroep\** (*College van Beroep voor het bedrijfsleven*, 9 July 2015, NL:CBB:2015:192, and *College van Beroep voor het bedrijfsleven*, 9 July 2015, NL:CBB:2015:193) found that the Dutch competition agency ACM was entitled to use information deriving from recordings lawfully collected by the Public Prosecution Service in the context of a criminal investigation. It stated, *inter alia*, that the recordings provided to the ACM could be regarded as criminal information and that there was no legal provision requiring the Public Prosecution Service to conduct a preliminary investigation before providing the ACM with information which could be considered by any court. It explained that the only precondition for forwarding recordings was that such transmission had to be necessary for substantial public interest reasons. The *College van Beroep* considered that the prohibition on cartels had a substantial public interest objective, since it concerned the country's economic well-being. Finally, it stated that the ACM was unable to obtain such information in a different or less intrusive manner.

\* The *College van Beroep* is the Trade and Industry Appeals Tribunal and the highest administrative judge in the Netherlands in the area of socio-economic administrative law.  
*Source*: Judgement of the General Court, Case T 54/14, 8 September 2016

The Lithuanian Competition Council reported three cases that were conducted with the support of the national Anti-Corruption Agency since 2015. In addition to support by the Anti-Corruption Agency in dawn raids and IT gathering, the co-operation allowed the Lithuanian Competition Council to use new types of evidence, such as wiretapped phone calls and meetings.

*Source*: Presentation by Lithuania in OECD-GVH Regional Centre for Competition in Budapest seminar on Cartel Detection Tools, 6 – 8 March 2018

The changes brought about by the digital era may necessitate revisiting and upscaling cartel detection tools. The Roundtable on Algorithms and Collusion (OECD, 2016<sup>[51]</sup>) addressed two issues relevant for cartel enforcement: the algorithms' potential to amplify cartelised conduct and the potential to amplify the so-called "oligopoly problem" and make tacit collusion a more frequent market outcome and in this way create new cartel risks. Collusion that is facilitated or caused by algorithms will bring about challenges for detection and proof of such an infringement. The IT investigation tools used by agencies and their understanding of algorithms may need to be enhanced further.

Parallel to the OECD work, the ICN has produced valuable materials on investigation powers, for example the "Catalogue of Investigation Powers for Cartel Investigations",<sup>4</sup> and Chapter 1 of the Anti-Cartel Enforcement Manual that identifies searches as the tool of choice for effective cartel investigations,<sup>5</sup> Chapter 3 on Digital Evidence Gathering,<sup>6</sup> and Chapter 6 on Interviewing Techniques.<sup>7</sup>

In parallel, the European Commission published a proposal for an ECN+ Directive<sup>8</sup> which aims at empowering authorities of the EU Member States to be more effective enforcers.

The proposal includes in chapter IV the core minimum effective powers to investigate: the power to inspect business and non-business premises and to issue requests for information. It thus implicitly recognises potential gaps in the investigation tools available to the EU competition authorities and lists the powers that can be considered minimum requirements for effective cartel enforcement, in line with the discussion held at the OECD and the ICN.

#### **Box 6.4. Proposal for an ECN+ Directive – Chapter IV Powers**

*“Investigation and decision-making powers and procedures are the main working tools of competition authorities. However, currently there is a patchwork of powers across Europe, with many NCAs [national competition authorities] not having all the powers they need. The scope of NCAs’ investigative and decision-making powers varies considerably, which can significantly impact on their effectiveness.*

*To address this, the proposal provides for the core minimum effective powers to investigate (the power to inspect business and non-business premises, to issue requests for information) and to take decisions (the power to adopt prohibition decisions including the power to impose structural and behavioural remedies, commitment decisions, and interim measures). Taking action to ensure that NCAs have such effective tools was widely supported in the public consultation. For example, stakeholders, particularly businesses, highlighted that the lack of power for NCAs to impose structural remedies was particularly problematic for companies damaged by the anti-competitive behaviour of the infringer.*

*The proposal will also ensure that those tools have teeth by providing for effective sanctions for non-compliance. To be meaningful they will be calculated in proportion to the total turnover of the undertaking concerned, but Member States will have flexibility in how this is implemented (e.g. specific percentages are not set for the level of the fine).”*

Source: <http://ec.europa.eu/competition/antitrust/nca.html>

## **6.2. Results of the 2017 Survey on Investigative Powers**

Powers for cartel investigations are similar among jurisdictions. All respondents replied to have compulsory powers to: (i) require the production of documents/information (with the exception of Korea); (ii) conduct search warrants or dawn raids; (iii) gather and analyse electronic evidence; and (iv) obtain oral statements.

Six respondents have wiretap authority. Three out of these 6 agencies specified that they can use wiretapping only in criminal investigations.

Around one third of respondents reported having other specific investigative powers. In addition to the power to obtain oral statements, the European Commission has the power to obtain written corporate statements when dealing with leniency applications. Japan can entrust juridical persons (established by a special law or regulation<sup>9</sup>), enterprises, government agencies or others to carry out necessary research or surveys, order experts to appear and give testimony, and ask organisations or government offices (national and local) to provide reports. Switzerland and Lithuania have the power to require an expert opinion. The United Kingdom has the power to require compulsory interviews as well as covert surveillance powers, and can use covert informants to support cartel investigations.

The vast majority of authorities commented on the relative importance of different powers, providing similar answers. Overall, a full set of powers is considered important for effective cartel enforcement, and a single information collection power is rarely used on its own. Dawn raids are regarded as most useful, and requests for information as most frequently

used. Spain, Italy, Finland and Brazil specifically mentioned the power to gather and analyse electronic evidence as highly relevant for their activities. Germany reported that, although relatively new, its power to require the production of documents on turnover data or company structure is often used.

Seventeen respondents have the powers to impose penalties on companies for non-compliance or obstruction of investigations, thus penalising behaviour such as non-compliance with competition authorities' orders, refusal to submit information, denial of access to requested information, submission of false or misleading information, failure to submit requested information by the deadline and breach of obligation to co-operate with the authority. 12 jurisdictions indicated they have imposed such penalties since 2011.

### 6.3. Conclusions and steps forward

Effective investigative powers are the backbone of successful hard core cartel prosecution. The potentially high fines and, in some jurisdictions, criminal sanctions impose high evidentiary standards upon competition authorities. These need to be matched by investigation instruments that enable competition agencies to obtain relevant direct and additional circumstantial evidence to make their cases.

Since offenders have become increasingly aware of the illegality of hard core cartels and of the kind of documents that competition agencies will look for, cartels are a well-hidden activity. Offenders will use ways to disguise their activity and hide traces of it. All loopholes that a jurisdiction provides, such as a lack of search powers for private premises or effective access to IT storage, can be expected to be used.

In terms of enforcement instruments, there seems to be widespread agreement that unannounced inspections, the powers to require the production of documents and information, gather and analyse electronic evidence and obtain oral statements are essential tools for competition agencies in their fight against cartels. These tools can be complemented by additional powers such as wire-tapping. The application of some or all of the tools may require a court order, depending on the specific legal and enforcement framework of the different jurisdictions.

New instruments to co-ordinate cartel activity such as the use of algorithms will require competition agencies to step up their knowledge of such instruments and to develop matching investigation tools.

The co-operation with other national enforcement bodies, like anti-corruption bodies and public prosecutors, can help competition agencies to obtain valuable evidence in hard core cartel cases, as far as the evidentiary rules of a jurisdiction allow.

The Recommendation could be revised to refer to specific investigative powers in more detail. Specifically, it could recommend that competition authorities have powers to:

- Conduct unannounced inspections (“dawn raids”) at business and private premises, and access and obtain all documents and information necessary to prove cartel conduct;
- Access electronic information, including electronic material that is stored remotely (e.g. on ‘the cloud’), that could help establish a cartel violation. For this purpose, competition authorities should have trained specialised staff and adequate hardware and software equipment;



- Request and obtain information from investigated and third parties, including other government entities;
- Obtain oral testimony from businesses and individuals;
- Impose or seek penalties for non-compliance with mandatory requests and obstruction of investigations.

The co-operation of competition authorities with other public entities, such as public procurement bodies, public prosecutors and anti-corruption agencies, as well as the exchange of information and evidence among different public authorities should be facilitated, if the relevant legal framework allows it

### Notes.

<sup>1</sup> [www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm](http://www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm).

<sup>2</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003R0001>

<sup>3</sup> Commission Notice on cooperation within the Network of Competition Authorities, (2004/C 101/03), [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004XC0427\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004XC0427(02)&from=EN)

<sup>4</sup> [www.internationalcompetitionnetwork.org/uploads/library/doc1097.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc1097.pdf).

<sup>5</sup> [www.internationalcompetitionnetwork.org/uploads/library/doc340.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc340.pdf).

<sup>6</sup> [www.internationalcompetitionnetwork.org/uploads/library/doc1006.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc1006.pdf).

<sup>7</sup> [www.internationalcompetitionnetwork.org/uploads/library/doc345.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc345.pdf).

<sup>8</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0142>.

<sup>9</sup> Corporations established on a basis of a law or regulation specifically enacted for them (their legal personalities are not governed by the general Corporation Law or Commercial Law).



## Chapter 7. Case Resolution

Hard core cartels are considered “*the most egregious violations of competition law*” (OECD, 1998<sup>[52]</sup>). The nature of the infringement limits the options for case resolution. The common outcomes of public enforcement proceedings are prohibition or cease- and-desist orders, which will often be accompanied by penalties on undertakings and/or individuals that are monetary or non-monetary in nature. Commitment (consent decree) decisions or remedies are rarely used in hard core cartel cases. Many cases will be resolved using a settlement or plea-bargaining procedure.

### 7.1. Decisions in Hard Core Cartel Cases

Decision-making powers in hard core cartel cases vary and will often depend on the legal framework for prosecution being administrative, civil or criminal or a combination of administrative and criminal. When cartels are dealt with in an administrative procedure, the decision to issue a cease-and-desist order and, eventually, to impose a fine will usually be taken by the competition agency. In civil and criminal enforcement regimes, the ultimate decision, after the investigation of the competition agency and/or the public prosecutor, will be taken by a court or a jury.<sup>1</sup>

The decision on a hard core cartel will state the illegality of the acts that constitute the violation and impose an end to the infringement.

### 7.2. Commitments

Commitment decisions and other types of negotiated remedies in antitrust cases are enforcement tools whereby a competition authority can terminate the investigation by accepting remedies or commitments voluntarily proposed by the parties to address the initial concerns identified by the agency (OECD, 2016<sup>[53]</sup>).

Given that hard core cartels are considered to be *per se* violations (in the United States) or by object infringements (in the European Union), there is usually little room to negotiate lesser legal consequences than a total ban of the infringing behaviour. For this reason, for the European Commission and most of the EU member countries, commitments are not applicable to hard core cartels.

However, there are competition authorities that use commitment decisions in hard core cartel cases, see for example Czech Republic<sup>2</sup>, Slovenia<sup>3</sup> and China<sup>4</sup> (OECD, 2016, p. 15<sup>[53]</sup>). In a case in Turkey (Box 7.1), commitments to terminate a structural relationship between two cartel offenders were accepted. If applied in this way, commitments could be used to remove structural market characteristics that are conducive to illegal conduct, in addition to a prohibition/fine decision.

### Box 7.1. Commitments in Cartel Cases – Turkey

Article 27 of the Competition Act (the “Act”) allows the Turkish Competition Authority (“TCA”) to take necessary measures to terminate violations of the Act and impose administrative fines. Pursuant to Article 9 of the Act, the TCA generally makes a decision that will terminate the anti-competitive behaviour and re-establish competition. Further, companies may sometimes offer commitments to address competition concerns before the TCA makes a final decision.

An investigation conducted by the TCA established that two independent practices within the flat steel products market and its submarkets had violated the Act. These were violations by the ArcelorMittal Group (“A”) and Erdemir (“E”), and by E and Borçelik (“B”). With respect to the first violation, it was decided that A and E co-ordinated their behaviour, controlled the amount of supply, and determined the sales conditions through agreements and business practices related to them. Concerning the second violation involving E and B, various documents were found indicating the regular exchange of information, such as the amount of purchases and sales between the two firms, which restricted competition and resulted in the co-ordination of their behaviour. It was apparent that the minority shares E had in its competitors (namely in A and B) led to the exchange of commercially sensitive information between the target companies, which further contributed to the co-ordination of their behaviour.

When determining the case resolution method, the TCA considered the market power of the target companies and the significant lessening of competition in the relevant market. Moreover, the TCA took into account the commitment offered during the investigation by E to sell the minority shares it owned in its competitors, as it was thought to be an important structural measure to avoid a similar negative impact on competition in the market in the future. As a result, the TCA decided to impose administrative fines on the three companies and required the termination of E’s shareholder status in both A and in B.

The decision was confirmed in last instance by the Turkish Court of State in 2015.

Sources: ICN Anti-Cartel Enforcement Manual, Subgroup 2 Enforcement Techniques, p. 9; <http://internationalcompetitionnetwork.org/uploads/library/doc834.pdf>; Turkish Competition Authority.

## 7.3. Settlements and Plea Negotiation

### 7.3.1. Background and developments

Plea agreements have been used in the United States and Canada for a long time and are a standard feature of the enforcement process there; cartels are criminal offences in both countries. Settlements are a relatively recent development in administrative legal systems. For example, the European Commission introduced the settlement procedure for cartels in 2008.<sup>5</sup>

There is no commonly agreed definition of settlements or plea agreements. In both cases the parties to the agreement, i.e. the competition authorities and the undertakings suspected of anti-competitive cartel conduct, agree on a number of substantive findings in a cartel case and on matters related to procedure in exchange for a speedy resolution of the case and reductions in fines.

The main difference between plea negotiation in the United States and settlements with the European Commission is that plea agreements in the United States typically require early, continued and substantive assistance with the investigation, including the provision of evidence and witnesses and can lead to a significant reduction of the fine. A European Commission settlement will grant a limited fine reduction in exchange for a waiver of

certain procedural rights by the parties to the proceeding, but without assistance for the substantive part of the investigation.

In this sense, plea negotiation is considered to be also an investigation tool and a complement to the US leniency system that foresees immunity only for the first to report, but no reductions for subsequent applicants. This is different in the European Union, where subsequent leniency applicants can benefit from fine reductions of up to 50 % in exchange for full co-operation in the investigation. The settlement reduction is unrelated to co-operation within the leniency framework and rewards merely a contribution to an expedited procedure.

### Box 7.2. European Commission Settlement Procedure

- The European Commission (EC) will issue an invitation to the parties in a cartel proceeding to enter into settlement discussions after an investigation of the case, when it is prepared to adopt a fully motivated statement of objections.
- The opening of a settlement procedure is within the full discretion of the EC; the parties have neither a right nor an obligation to participate in settlement discussions.
- In a series of meetings, the EC discusses with each party bilaterally the assessment of the case as well as key evidence, the scope of potential objections by the parties and the amount of the value of affected sales. Access to key evidence will be given, while full access to file is only foreseen for the standard procedure.
- Fines will only be discussed once the discussions have led to a common understanding of the scope of the infringement.
- In a settlement submission, the parties must give a voluntary acknowledgement of the infringement, including liability, and provide a summary description of the main facts of the case as well as the legal assessment. They also indicate the maximum amount of fine they would be willing to accept.
- On this basis the EC will issue a statement of objections (SO) that is considerably shorter than in standard procedure and – after the parties have confirmed that the SO reflects their submission – adopts a settlement decision in normal procedure. This decision will establish the infringement, describe the basic facts of the case, require the infringement to end and impose a fine. The fine is reduced by 10 % as a result of the settlement procedure.
- All decisions are subject to judicial review.
- The EC is not required to settle a case with all parties to a proceeding.

*Source:* Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC0702\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC0702(01)); Laina, F. and E. Laurinen (2013), “The EU Cartel Settlement Procedure: Current Status and Challenges”, *Journal of European Competition Law & Practice*, [http://ec.europa.eu/competition/cartels/legislation/cartels\\_settlements/settlement\\_procedure\\_en.pdf](http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlement_procedure_en.pdf)

The EC settlement thus rewards procedural efficiency; it is not an investigation tool. The EC saves resources as the Statement of Objections (SO) will be shorter than in normal proceedings and a final decision can be adopted very soon after the issuance of the SO. The defendant’s access to file is limited. In exchange, they benefit from an expedited procedure, a greater sense of involvement and influence on the outcomes as well as more transparent and predictable results, in addition to the 10 % reduction of the fine (OECD, 2008, pp. 79-84<sub>[54]</sub>).

While plea negotiation has always been used in the US cartel enforcement system, settlements aiming at procedural efficiencies are a relatively recent development.

A number of key points emerged from the discussions held at the OECD in 2006 (OECD, 2006<sup>[26]</sup>), and 2008 (OECD, 2008<sup>[54]</sup>). Many jurisdictions had by then started using some kind of settlement procedures and there was agreement on the potential time and resource savings through their use. Still, there were divergences on issues like mandatory admission of guilt by defendants in a settlement, the separation of leniency and settlement policies and their interdependence, the need for uniform as opposed to hybrid settlement results and the volume and differentiation of settlement discounts.

First, transparency and predictability was generally seen as a prerequisite for any successful settlement policy. A reliable policy framework and its predictable implementation enhance the incentives for defendants in cartel cases to co-operate on procedure, and provide them with a sense of security as well as influence on the final outcome.

Secondly, strong arguments were raised in favour of an admission of guilt on the part of the infringing party. An acknowledgement of guilt and liability is considered to be warranted by the seriousness of the cartel offence. Therefore, its mandatory inclusion in the settlement would underline the gravity of the infringement and exclude guilt from the scope of potential negotiations in the settlement procedure. Any follow-on private damages actions will also benefit from an admission of guilt, thus strengthening the combined deterrent effect of public (settlement) and private (lawsuit) enforcement efforts. However, some jurisdictions saw advantages in being able to negotiate the inclusion of guilt in the settlement decision, as this could help to overcome obstacles in the negotiation of a settlement.

Thirdly, jurisdictions that rely on leniency programmes as one of their main detection/investigation tools are often concerned about the interaction of their leniency and settlement policies. Leniency and settlement policies ultimately pursue the same goals – to increase detection and deterrence. Leniency does this by creating strong incentives for offenders to break the cartel ranks and to be the first one to report, in exchange for immunity or at least a significant reduction of the fine. Settlement policies enhance the effectiveness of enforcement, speed up cases and free resources for agencies to handle more cases; this will also increase deterrence and facilitate detection. If settlement rewards would be easy to obtain and high, this could weaken the appeal of a leniency programme and reduce the incentives for offenders to come forward with information on hard core cartels. Competition agencies were thus aware of the risk that a leniency policy could be undermined if settlement rewards became too generous.

Fourthly, jurisdictions with separate, EC-style leniency and settlement policies debated whether the competition agency should pursue a strict policy of uniform settlements, where all defendants settle, or whether they should allow for so-called hybrid settlements, where only some defendants settle while others do not, and the full enforcement procedure continues for non-settling offenders. There are clear advantages in terms of resource savings in uniform settlements. Still, such a policy would not take into account the various and often conflicting motives of firms when they decide to opt for a settlement or not. In the worst case, the agency risks being taken hostage by the last to settle. If the entirety of a successful cartel settlement with an often high number of independent offenders hinges upon the consent of the last to sign up for the settlement, in the end the agency will have a weaker bargaining position vis-à-vis all offenders. In contrast, it seems that experienced plea negotiation jurisdictions such as the United States do not face this problem, as differentiated timing, co-operation and fine reductions in the same case have always been

the reality and are in conformity with the criminal prosecution system. It seems that over time and with increased experience of enforcement agencies and offenders with settlements, substantial procedural economies can be obtained even in hybrid settlement cases.

Fifth, the discussions held at the OECD in 2006 and 2008 did not identify a real problem with regard to the rights of defence. In United States plea negotiation in particular, the parties tend to be well advised legally and voluntarily waive rights (including the right to appeal) in exchange for significant reductions of fines. In fact, the waiver of the right to appeal as part of settlement procedures should be considered in relation to each specific jurisdiction and the nature of its enforcement system. In criminal and civil systems, an independent court hears (and, eventually, can accept) a plea agreement as proposed by the agency. This explains why the right to appeal can be voluntarily waived in this procedure where the competition authority is one of the two parties in the court proceedings and not the adjudicator itself. By contrast, in some administrative enforcement systems where the settlement decision is issued by the agency, such a waiver may be problematic, as it would preclude the involvement of an independent court and would grant final decision powers to an agency that is prosecutor and adjudicator at the same time. Each jurisdiction will therefore need to select the appropriate method in accordance with its applicable laws.

Sixth, settlements in cross-border cartel cases can be more complex. Defendants that face prosecution in more than one jurisdiction can be expected to try to follow a unified defence strategy and consider their options under the often varying settlement and plea negotiation policies in the different jurisdictions. Private parties are often concerned with the consequences of co-operation and admission of guilt in one jurisdiction in on-going investigations in another jurisdiction. Further harmonisation of laws and settlement policies and increased co-operation in cartel cases could alleviate some of the concerns.

Settlements could have an impact on follow-on private damages claims. On the one hand, an admission of guilt, if required, may facilitate private actions and expose cartel members to compensation claims. On the other hand, there is a strong incentive for private parties to enter into settlement negotiations with the competition agencies in order to reduce the agreed period of cartel duration or products covered, or to avoid an acknowledgement of guilt (when an admission is not required). A lower (agreed) duration or product range, and a non-admission of guilt, may reduce the scope or, at least, the ease of potential follow-on claims.

With regard to the increased exposure to follow-on litigation on damages, the EU Directive on antitrust damages actions foresees strict safeguards to protect settlement submissions from access to file by private damages claimants and their use in private litigation. As the Directive was transposed into national law by most Member States in 2017, the effects on leniency and settlement policies remain to be seen.

The ICN has conducted work on settlements in 2008 (ICN, 2008<sup>[55]</sup>) and 2009 (ICN Manual Leniency, 2014, p. 5<sup>[38]</sup>). The 2008 ICN paper on settlements is based on a survey among ICN member countries and illustrates many of the topics that were also addressed in the 2006 and 2008 OECD discussions, as described above. The ICN publication goes into detail on the types of cartel settlement systems, the interplay between leniency and settlements, the key principles of cartel settlements, benefits of cartel settlements, key issues commonly addressed in cartel settlement discussions and key elements of cartel settlements. It provides good illustrations and case examples for the various systems and questions. The conclusions are very much aligned with the discussions at the OECD.

### ***7.3.2. Results of the 2017 Survey on Settlements and Plea Bargaining***

The majority of competition agencies have obtained powers to enter into settlements, plea negotiations or commitments during the last decade, and these instruments are now considered a useful tool to resolve cartel cases, without resorting to full-fledged infringement investigations. 30 out of 42 jurisdictions have at least one of these measures available to them.

23 agencies reported having had at least one case resolved consensually in the period 2011-2016.

Most of the competition authorities that had a settlement case for cartels recognise that there are considerable benefits, such as saving time and resources linked to quicker case resolution, a reduced number of appeals in court (reported by Romania, Switzerland, Germany, Greece, Hungary and the European Commission), and simplified processes.

Belgium indicated that the use of settlements allowed the Belgian competition Authority to reduce the average duration of procedures from 36 months to 22. The European Commission noted that on average a classic settlement case takes around two and a half to three years, compared to the five years of ordinary procedures.

In addition to savings, both in terms of time and resources, South Africa and Brazil underlined that the use of settlements lead to more robust cases. The United States note in this respect that “*settlement benefits include inducing increased early co-operation, which leads to early insider evidence as well as momentum in Division investigations after settlements become public*”. Australia notes that one of the primary benefits of settlement procedures is obtaining the parties’ co-operation throughout the investigation and in subsequent prosecutions or civil actions.

Some jurisdictions identify challenges associated with settlement procedures. Unlike leniency/amnesty programmes, where convergence has been achieved to a large extent, there seems to be higher dissimilarity in negotiated procedures across countries, in particular between those with criminal sanctions for cartels and those with purely administrative ones. As a consequence, challenges to settlement procedures vary noticeably among jurisdictions.

The ACCC reported that for criminal cartel matters such challenges include the need for the ACCC to engage with defendants through the Federal Prosecution Service,<sup>6</sup> the lack of understanding of the settlement process among a number of legal practitioners, and the lack of Deferred Prosecution Agreements,<sup>7</sup> which would make responses to cartel activity more effective and efficient and encourage a more substantial self-reporting by firms.

In New Zealand the competition authority has encountered obstacles getting witnesses from the settling parties when it decides to prosecute. Also, ensuring that parties continue to co-operate once the investigation phase is over has been complex in some instances.

In South Africa, the authority has identified problems with the consistent application of the method for calculating penalties for settlement purposes. In addition, parties often seek to settle matters without admitting guilt, and use delay tactics aimed at establishing the solidity of the Commission’s case against them before settling.



### Box 7.3. Settlement in South Africa: the construction cartel

In 2009 the Competition Commission of South Africa opened an investigation in the construction sector, after receiving evidence of pervasive cartel activity. Given the number and magnitude of such cases, in 2011 the Commission launched the Construction Fast Track Settlement Process, in order to incentivise companies to enter into settlement agreements and expedite the resolution of cases.

In 2013, the Commission settled with 15 out of 18 construction firms participating in the Fast Track Settlement Process and the Tribunal imposed on the 15 undertakings a total combined administrative fine of ZAR 1.4 billion. In this case, more than 300 private and public sector projects affected by bid rigging were uncovered, including major infrastructure development projects.

Thanks to the Fast Track Settlement Process it was possible for the Commission to discover how firms historically determined, maintained and monitored collusive agreements. Given the massive public outcry about the construction cartel, even before the 15 firms appeared before the Tribunal, the Commission could have elected to prosecute each firm individually in a contested proceeding. However, in the Tribunal's very conservative estimation, the cost of such proceedings would have been ZAR 9,226,282.64 to the Tribunal alone, and the cases would have taken more than two and half years to conclude once they were ready for trial.

The settlement proceedings therefore clearly saved the justice system much time and money through the two-day hearing that took place in these matters during the 2014 financial year.

Source: DAF/COMP/WD(2016)47 Note by South Africa, DAF/COMP(2016)7

Some respondents identified challenges in the use of settlement procedures. For example, in Switzerland, a settlement decision (called amicable agreement) does not terminate the proceedings. COMCO needs to continue the proceeding and make an infringement decision that is separate from the amicable agreement. If at the end of the infringement procedure an unlawful restriction of competition is found, further sanctions can be imposed. As explained in the COMCO contribution (OECD, 2016<sup>[56]</sup>) to the Roundtable on Commitment Decisions in Antitrust Cases (OECD, 2016<sup>[57]</sup>), "*in cases where the COMCO has to impose sanctions and consequently needs to adopt an infringement decision, it may "only" consider the co-operation in context of an amicable settlement as a mitigating factor in the calculation of fines*".

In the European Union hybrid settlement cases, involving one or more parties willing to settle as well as one or more parties which will eventually not settle, constitute the principal challenge. Due to procedural inefficiencies linked to running two parallel procedures for one case (infringement procedure and settlement procedure), the European Commission usually tries to avoid hybrid cases. However, to avoid situations in which a company prevents other parties from using the settlement procedure, the European Commission may still pursue a hybrid case in some occasions.

The variety of examples provided by respondents illustrate that, although negotiated/consensual procedures are a widespread practice with substantial benefits, challenges remain.

## 7.4. Conclusions and steps forward

The question about the appropriate legal resolution of a hard core cartel case has in almost all cases a very straightforward answer: the behaviour in question needs to stop and a prohibition, whatever legal form it may take, is the only way to achieve this.

Commitment decisions are an option in some jurisdictions, while others rule them out for hard core cartel violations. If commitments are used as an ancillary to a prohibition decision to support and strengthen the prohibition, this may be an interesting option.

US-style plea negotiation and EU-style settlements can facilitate cartel investigations to a great extent. The advantages of co-operation of the defendants on substance are obvious. Even if the co-operation is reduced to procedural matters such as shorter and more comprehensive statements of objections and decisions, reduced access to file and in some cases waivers of the right to appeal, this will reduce the duration of a cartel proceeding and the corresponding use of agency resources significantly. A lack of or fewer court appeals are also attractive prospects for competition agencies and would lead to resource savings at this stage as well.

Defendants benefit from streamlined cartel investigations and do not forgo any rights, as it is always a voluntary decision of the firms to enter into a consensual case resolution process. The benefits are faster proceedings and more predictability about the likely outcome as well as a certain degree of influence due to early involvement in the process, all in addition to a meaningful fine reduction.

An increasing number of agencies have the power to use settlements, or plea negotiation instruments for negotiated and expedited case resolution. The experiences are encouraging as they demonstrate the expected time and resource savings, but there are also open questions, uncertainties and procedural obstacles to a fully effective use encountered by some agencies.

Every competition agency that uses these instruments needs to ensure that it balances the benefits and risks of their use. Plea negotiation and settlement policies interact with leniency policies. They also have an impact on private follow-on litigation for damages. The aim should be to achieve an optimal level of enforcement and deterrence in using all the policies in a carefully balanced approach. Such an approach must also be in line with the legal framework of the individual jurisdiction and must respect the rights of defence of the offenders.

The Recommendation could be revised to refer to the option of introducing instruments that enable and reward flexibility in the procedure and negotiated case resolutions, such as settlements. Such instruments should be fully in line with each jurisdiction's legal framework, not interfere unduly with the leniency policy and private enforcement framework and respect the rights of defence.

## Notes

<sup>1</sup> ICN Anti-Cartel Enforcement Manual, Case Resolution Chapter, pp. 2 – 6; <http://internationalcompetitionnetwork.org/uploads/library/doc834.pdf>.

<sup>2</sup> GCR – The European Antitrust Review 2016, Czech Republic; <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2017/1067831/czech-republic-overview>.

<sup>3</sup> GTDT Cartel Regulation 2017; <https://gettingthedealthrough.com/area/5/jurisdiction/83/cartel-regulation-slovenia/>.

<sup>4</sup> ICLG, Cartels and Leniency, China; <https://iclg.com/practice-areas/cartels-and-lenieny-laws-and-regulations/china>.

<sup>5</sup> Competition – Cartels – Legislation – Settlements:

<http://ec.europa.eu/competition/cartels/legislation/settlements.html>.

<sup>6</sup> In order to build an effective relationship with the CDPP (the Commonwealth Director of Public Prosecutions), in 2014 the ACCC and CDPP signed a Memorandum of Understanding regarding serious cartel conduct.

<sup>7</sup> According to a public consultation paper by the Australian Government, “*Improving enforcement options for serious corporate crime*” (2017), “DPAs [Deferred Prosecution Agreements] are used in both the United States and United Kingdom in relation to serious corporate offences. Under a DPA scheme, where a company or company officer has engaged in serious corporate crime, prosecutors have the option to invite the company to negotiate an agreement to comply with a range of specified conditions. These conditions typically require the company to cooperate with any investigation, admit to agreed facts, pay a financial penalty, and implement a program to improve future compliance. A company will not be prosecuted in relation to the matters that were the subject of the DPA where the company fulfils its obligations under the agreement”.  
[www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreement-scheme/A-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.pdf](http://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreement-scheme/A-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.pdf)



## Chapter 8. Sanctions against hard core cartel activity

### 8.1. Background

The Recommendation stipulates that the competition laws of Adherents should provide for “*effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels*”. Sanctions can be administrative, civil, criminal, monetary and non-monetary, against companies as well as against individuals. For the purposes of this report, the term “monetary” means financial penalties of a compulsory nature imposed by a public entity (competition agency, tribunal or court), including administrative fines, civil pecuniary penalties and criminal monetary fines but excluding antitrust damages payable to parties harmed by cartels.

The Recommendation thus recognises that sanctions for anti-competitive conduct aim at preventing competition law violations from occurring in the first place. Deterrence requires that probability of sanctions and their magnitude are sufficient to prevent or cease cartel conduct; i.e. it requires a realistic threat that sanctions will exceed the profits expected from the cartel.

A variety of factors will determine whether any sanction has deterrent effects including whether (i) there is a reasonable probability that unlawful conduct will be detected; (ii) there is some degree of certainty that the sanction will be imposed; (iii) the sanction will be imposed relatively swiftly; and (iv) the potential sanction is perceived to be severe, making cartels unprofitable and not a tolerated cost of doing business (OECD, 2003<sub>[23]</sub>).

A 2002 OECD report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws (OECD, 2002<sub>[19]</sub>) highlighted that, if a cartel has been formed (and therefore specific deterrence is no longer possible), the threat of serious sanctions creates an incentive for cartel members (companies or individuals) to defect, report and co-operate with investigating agencies, in exchange for reduced sanctions or full immunity. The “carrot and stick” approach to cartel investigation requires that the “stick” – the possible sanction – be sufficiently severe to give effect to the “carrot” – the opportunity to avoid the sanction by reporting the conduct and co-operating with the agency. Thus, in addition to deterrence, sanctions also have co-operation purposes.

More recent OECD work suggests that sanctions can, in some jurisdictions, also aim at punishment, disgorgement of illegal gains or compensation (OECD, 2016<sub>[58]</sub>).

### 8.2. Monetary sanctions

Monetary sanctions against companies include administrative, civil and criminal fines. Since the adoption of the Recommendation the statutory level of monetary fines against companies engaged in cartels has increased in almost all OECD jurisdictions<sup>1</sup>, and the fines actually imposed are on the rise too (Connor, 2016<sub>[1]</sub>).

In 2003, the OECD organised a roundtable on sanctions (monetary and non-monetary) against individuals. The discussion showed that corporate fines are often not severe enough

on their own to make cartel activity obviously unprofitable, and thus may not have a sufficient deterrent effect. Specifically, corporate fines may not be sufficiently high to provide incentives for a company to refrain from participating in cartels, or effectively monitor its agents so as to prevent them from agreeing to cartel conduct and putting the company at risk of being fined. Besides, a company will not always have the means to supervise its agents and stop them from engaging in a cartel (OECD, 2003<sup>[23]</sup>).

Sanctions and other measures against individuals are an important additional enforcement tool. Hard core cartels involve individuals who act on behalf of a company. It thus makes sense to prevent those individuals from engaging in unlawful conduct by threatening to fine them directly in case they engage in unlawful conduct. Most jurisdictions that use sanctions against individuals in cartel cases do so precisely because they accept that corporate sanctions alone cannot ensure adequate deterrence. Individual sanctions are considered a useful addition in the battery of enforcement mechanisms against cartels, although there is no systematic empirical evidence to prove the deterrent effects of sanctions against individuals (OECD, 2003<sup>[23]</sup>).

The 2004 roundtable on sanctions against individuals (OECD, 2003<sup>[23]</sup>) argued that monetary sanctions against individuals have lower deterrent effect than criminal sanctions (criminal sanctions are discussed in section 8.3 below). Monetary sanctions can be deprived of their effectiveness, if the company compensates its employee for the fine -which can happen even when reimbursement is forbidden by law. In the case of international cartels in particular, monetary sanctions may concern individuals based in jurisdictions other than the jurisdiction taking enforcement action and may be either legally or practically difficult or impossible to impose and enforce (OECD, 2018<sup>[59]</sup>).

The method for calculating monetary sanctions against companies varies among jurisdictions. Many start with the calculation of a base fine, usually based on a percentage of the turnover, value of sales or volume of affected commerce related to the infringement. This base fine can be modified to take into account mitigating circumstances (such as: co-operation with the competition authority, minor role in the cartel and, in few jurisdictions, an effective compliance programme) and aggravating ones (such as: recidivism - the most common aggravating factor, cartel leader, instigator or coercer, involvement of senior management, and duration of the agreement in jurisdictions where duration of the agreement is not included in the calculation of the base fine). The final amount can then be adjusted to ensure adequateness and that it does not exceed the maximum penalty allowed by law. The methods for setting sanctions may differ depending upon the objectives that jurisdictions prioritise. Many competition authorities introduced or considering introducing fining guidelines to provide transparency and objectivity in fine calculations (OECD, 2016<sup>[58]</sup>).

National approaches on fining methods are usually reflected in publically available guidelines. The existence of clear fining methods reflected in guidelines ensures predictability and the uniform treatment of comparable violations, and enhances deterrence (OECD, 2018<sup>[59]</sup>).

Most jurisdictions also adjust the level of the fine based on the proved inability of the firm to pay the amount of the fine. Imposing high monetary sanctions against individuals may be more complex, as there is greater risk that they exceed the individual's capacity to pay.

### 8.3. Non-monetary sanctions

Non-monetary sanctions against companies include publication of infringement decisions (i.e. reputational hazard). Reputational effects may have significant deterrent effects. The possible economic impact derived from damage to a company's reputation may, in some cases, be larger than the loss arising from a pecuniary penalty, in particular when companies sell final consumer goods rather than intermediate goods, because individual consumers can be sensitive to corporate reputation when they make purchase decisions (OECD, 2016<sup>[58]</sup>).

Non-monetary sanctions against companies also include debarment (disqualification) from bidding for public contracts, when a company has been found guilty of rigging tenders. Regulations on debarment vary from one jurisdiction to the other, and are generally a matter of public procurement law and/or criminal law rather than competition law. Debarment can be a strong deterrent if it has a significant adverse impact on the turnover and long-term business of companies. However, if procurement agencies use debarment against leniency applicants (which they may be allowed to do, if the relevant laws do not forbid it and the competition and procurement authorities do not reach an agreement on this), the risk of debarment may deter cartel members from seeking leniency, in particular if they depend on public tenders for business viability. Debarment may also backfire in markets where there are few potential suppliers and high barriers to entry, as it may decrease the number of qualified bidders to an uncompetitive level and endanger security of supply. This risk is exacerbated if debarment is automatic and if all companies in a specific market segment have engaged in the bid rigging and are thus debarred from future public contracts. The OECD, in its assessments of the competition aspects of national or sector-specific public procurement systems against the Recommendation of the Council on Fighting Bid Rigging in Public Procurement [[OECD/LEGAL/0396](#)] recommends that debarment should be time bound and discretionary in order to take into consideration the characteristics of the relevant market.<sup>2</sup>

The strongest non-monetary sanction against individuals is imprisonment. A credible threat of imprisonment is deemed to enhance deterrence by making cartel conduct too unsafe to be reasonable (OECD, 2002<sup>[19]</sup>). In a 2003 roundtable on sanctions against individuals, participants argued that the prospect of spending time in jail is the most powerful deterrent for business executives and strengthens their incentives to resist corporate pressure to engage in unlawful activity (OECD, 2003<sup>[23]</sup>). The United States, where prison sentences against cartel members have long been used, finds imprisonment the most effective deterrent for hard-core cartel activity (OECD, 2011<sup>[60]</sup>, Submission by the United States).

There is anecdotal evidence suggesting that criminal sanctions against individuals have deterrent effects. There is however no systematic empirical evidence available to prove such effects and assess whether the marginal benefit of introducing sanctions against individuals (in the form of less harm from cartel activity) exceeds the additional costs that a system of criminal sanctions entails (including the costs of prosecution as well as of administering a prison system) (OECD, 2003<sup>[23]</sup>).

Other non-monetary sanctions against individuals include temporary or indefinite prohibition from managerial positions (director disqualification); barring individuals from serving as an officer of a public company; loss of business licences; community service; and requirements to publish the violation (reputational harm). The 2003 OECD roundtable on sanctions against individuals found that these sanctions have weaker deterrent effects than criminal sanctions (OECD, 2003<sup>[23]</sup>); still they are used as an additional disincentive against cartels.

### Box 8.1. Disqualification orders in selected OECD Members

In Australia, the competition agency may apply to the Federal Court of Australia for disqualification from managing corporations against individuals involved in contraventions of part IV of the Act. In 2014, the Court disqualified three individuals including a managing director of a company from managing a corporation due to his involvement in cartel activity for 3 years.

In Mexico, individuals involved in anti-competitive practices may face disqualification from acting as an adviser, administrator, director, manager, officer, executive, agent, representative or proxy at any company for up to five years.

In Sweden, in 2008 the Competition Act introduced a new sanction of disqualification orders for cartel activity. The Swedish Competition Authority can make an application for a disqualification order for persons at CEO-level, and the courts are authorised to impose disqualification orders on persons exercising legal or actual management of undertakings found to have initiated or participated in a cartel. However, persons who report a cartel to the Authority or fulfil the requirements for co-operation within the leniency programme will not be subject to a disqualification order.

In the United Kingdom, the possibility of director disqualification for competition-related infringements (Competition Disqualification Orders –CDOs) was introduced in 2003. Although CDOs are a civil law public protection measure, the competition authority does not have the authority to directly impose disqualifications on individuals. Under the CDDA, the court must make a CDO against a person if the court considers that the following two conditions are satisfied in relation to that person: (1) an undertaking which is a company of which that person is a director commits a breach of competition law, and (2) the court considers that person's conduct as a director makes him or her unfit to be concerned in the management of a company. CDOs can be sought for not only cartels but also abuse of dominance. The maximum period of disqualification under a CDO is 15 years. During the period in which a person is subject to a CDO it is a criminal offence for him to act as a director of a company, act as a receiver of a company's property, or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, or act as an insolvency practitioner.

*Source:* Adapted from (OECD, 2016<sup>[58]</sup>)

## 8.4. Developments 1998 - 2016

The 2000 report on the implementation of the Recommendation (OECD, 2000<sup>[2]</sup>) stressed the importance of serious sanctions for the effective deterrence of hard-core cartels.

In 2002, the report on the Nature And Impact Of Hard Core Cartels And Sanctions Against Cartels Under National Competition Laws showed an uneven but noticeable trend towards more and stronger sanctions (OECD, 2002<sup>[19]</sup>).

The 2003 and 2005 reports on the implementation of the Recommendation stressed that empirical evidence indicated that monetary sanctions against companies were in most cases substantially below the level of optimal deterrence (OECD, 2003<sup>[3]</sup>), (OECD, 2005<sup>[4]</sup>). The 2003 Report recommended that monetary fines against companies should be high to be truly dissuasive and, arguably, take into account both the expected gains from the cartel as well as the probability that the cartel will be detected and punished as a multiplier. The 2003 Report also recommended expanding the use of sanctions against individuals, including criminal sanctions, where these sanctions are consistent with the social and legal framework, and providing for (more) private enforcement.



Developments on the imposition of, among other, monetary sanctions against hard core cartels were discussed in recent OECD roundtable on sanctions (OECD, 2016<sub>[58]</sub>).

**Table 8.1. Cartel fines by year and continent-period 2004-2015 (USD, millions)**

Continent	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Total
Asia	1	387	45	260	89	741	302	1035	1678	834	904	268	6544
Europe	1716	2461	4995	6529	5146	5248	2395	4061	7792	836	5814	2147	49140
Latin America	1	366	228	76	20	46	1855	-	-	6	1421	316	4335
North America	863	4306	1802	1036	2553	493	1733	602	6707	518	8181	783	29577
Other regions	-	-	766	38	346	269	-	241	971	-	380	-	3011
Total	2581	7520	7836	7939	8154	6797	6285	5939	17148	2194	16700	3514	92607

Source: (OECD, 2016<sub>[58]</sub>)

In the case of international cross-border cartels, total fines actually imposed worldwide against companies having participated between 1990 and 2016 amounted to USD 112 billion, a mean average of USD142 million (Connor, 2016<sub>[1]</sub>).

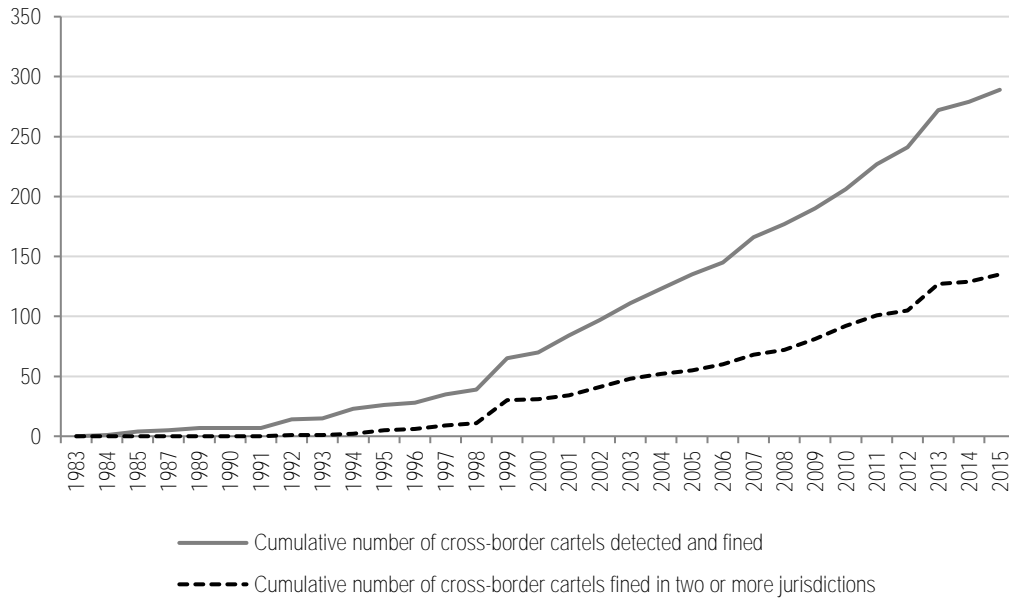
Monetary sanctions against cartels are thus, on average, on the rise. Still, the number of cartel cases has increased. Between 2010 and 2016, a record 75 new cross-border cartels were uncovered each year (Connor, 2016<sub>[1]</sub>).

In certain sectors (e.g. chemicals; cement and concrete; food products; and construction services, including public tenders) companies have been found to have colluded repeatedly, either in different jurisdictions or in the same jurisdiction (OECD, 2015<sub>[62]</sub>). More cartels and repeat offenders may suggest sanction levels remain insufficient. In a 2011 roundtable on Promoting Compliance with Competition Law, the discussion suggested that higher fines may be necessary, provided proportionality of the fine and firms' ability to pay are taken into account (OECD, 2011<sub>[60]</sub>).<sup>3</sup>

Recent OECD analysis indicates that there are gaps between the geographic scope of cartels and the number of jurisdictions imposing fines on cartel members. Specifically, more than half of the cross-border cartels in Professor John Connor's 2016 Private International Cartels database that were discovered since 1983 have been fined in only one jurisdiction (OECD, 2017<sub>[16]</sub>).

**Figure 8.1. Cumulative cross-border cartel detection and fines**

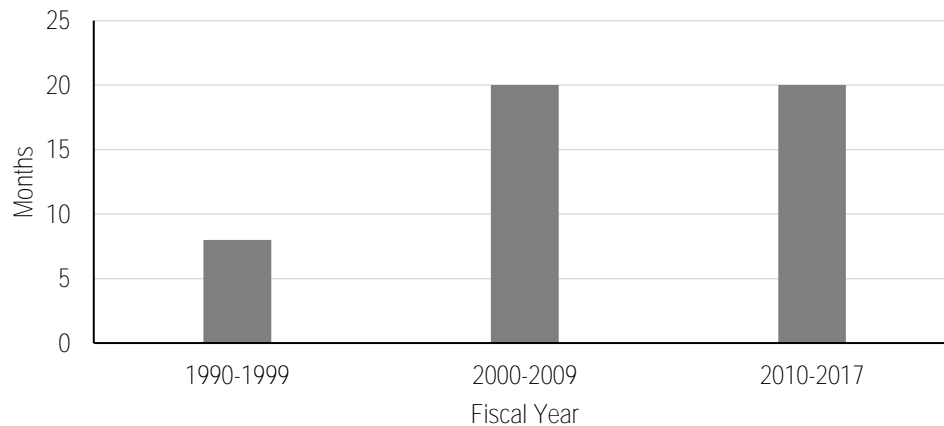
(Number of cases)



*Note:* The European Union is counted as a single jurisdiction for the purposes of classifying cartels as “cross-border” (so a cartel involving European Union countries only would not be considered “cross-border”).  
*Source:* OECD calculations based on the Private International Cartels database prepared by Professor John Connor. Starting in 2018, the OECD will verify and update this database.

The gap in Box 8.1 between cartel detection and fines could be due to several factors, including: different laws, competition authority powers and enforcement intensity; different local market realities and dissimilar impact of the cartel in each; challenges in small jurisdictions to take enforcement action vis-à-vis large multinational firms; limitations to the use of information from other jurisdictions in cartel prosecutions. However, unless a multinational cartel is prosecuted and fined in most or all of the countries in which it had effects, it might still be profitable after paying fines in some jurisdictions, and not in others (OECD, 2017<sub>[16]</sub>).

Regarding individuals in particular, imprisonment is still rare, outside the United States (by far the jurisdiction where custodial sentences are more prevalent) (Box 8.2) and Canada. A few more countries have now had criminal cases (including Israel and the United Kingdom (OECD, 2016<sub>[6]</sub>) (OECD, 2016<sub>[58]</sub>)). A first reason is lack of consensus, in many jurisdictions, that cartels are sufficiently reprehensible to justify criminal sanctions against individuals. A second reason is it can be difficult to condemn cartelists in a criminal case, because the criminal standard of proof (“beyond reasonable doubt”) is higher than the civil standard (“on the balance of probabilities”). Discussions at the OECD however highlighted that the risk of criminal sanctions has prompted some global cartels not to operate in highly profitable markets, suggesting that the risk of imprisonment can be effective at achieving deterrence (OECD, 2011<sub>[60]</sub>).

**Figure 8.2. Average Prison Sentence in Months in the United States**

Source: [www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts](http://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts)

### 8.5. Results of the 2017 Survey on Sanctions

The Survey sought to ascertain the different available sanctions against hard core cartels, their suitability to deter cartels and recent developments. It included questions on the amount of criminal and administrative fines against companies and individuals; jail sentences; and other sanctions against companies and individuals, such as debarring companies which have engaged in bid rigging from bidding for government contracts, or disqualifying individuals from management positions.

The majority of respondents replied that, since 2005, they have amended their regimes on sanctions for hard core cartels. Changes mainly concerned increasing the level of fines against individuals and companies, introducing criminal sanctions or other types of sanctions against individuals, increasing the maximum length of jail terms, adopting new methods to set fines, and bringing the domestic legislation in line with the EU regime.

#### **Box 8.2. Sanctions against companies and individuals: the case of the natural vinegar cartel in the Netherlands**

In 2015, the Netherlands Authority for Consumers and Markets (ACM) imposed sanctions against a cartel between two manufacturers of natural vinegar, Burg and Kühne, which had lasted from 2001 to 2012.

During the cartel period, the two undertakings exchanged commercially sensitive information on prices and production, and co-ordinated prices offered to their clients, usually food producers using natural vinegar in their final products.

The agency imposed a EUR 1.8 million fine on Burg. Kühne had notified the anti-competitive arrangements to the ACM using the leniency programme and closely co-operated with the ACM during the investigation. It was thus granted full immunity and avoided a fine amounting to EUR 4.6 million.

In this case, the ACM also imposed fines on Burg's employees who were directly involved in the cartel (from implementing the actual co-ordination to refraining from ending the infringements), amounting to EUR 16 000 and EUR 54 000 respectively. The Kühne employees escaped penalties varying between EUR 22 500 and EUR 135 000, as Kühne's leniency application was also submitted on behalf of the employees.

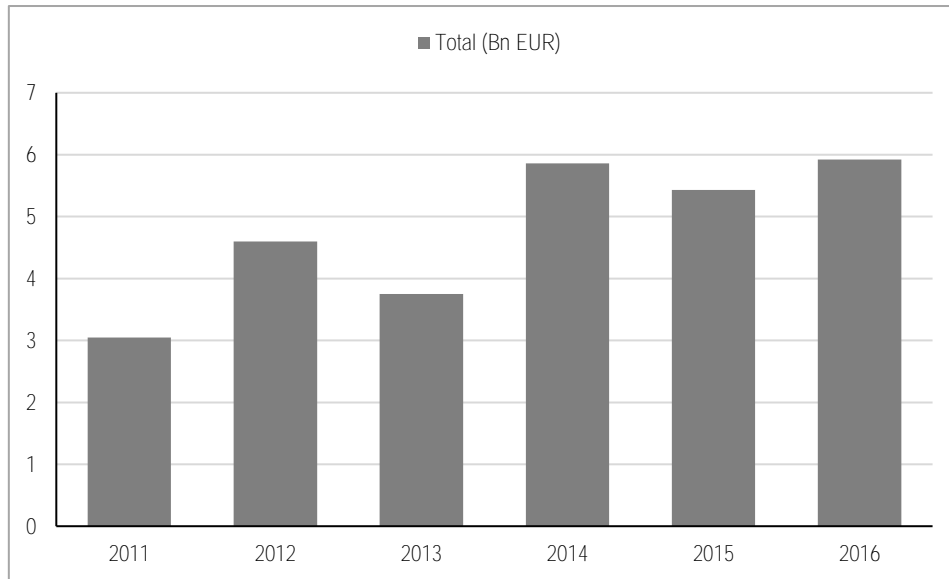
Source: ACM fines natural-vinegar manufacturers for cartel agreements, [www.acm.nl/en/publications/publication/14615/ACM-fines-natural-vinegar-manufacturers-for-cartel-agreements](http://www.acm.nl/en/publications/publication/14615/ACM-fines-natural-vinegar-manufacturers-for-cartel-agreements); [www.lexology.com/library/detail.aspx?g=67526901-150b-4734-9ee3-65df9307f833](http://www.lexology.com/library/detail.aspx?g=67526901-150b-4734-9ee3-65df9307f833)

### 8.5.1. Sanctions against companies

Competition authorities impose sanctions against companies engaging in cartel activities. Respondents report that they consider their statutory sanctions adequate.

Since 2011 there is a general trend towards higher fines against companies, as Figure 8.3 illustrates.

**Figure 8.3. Total amount of criminal and administrative monetary sanctions imposed against companies by 36 respondents, between 2011 and 2016**



There have also been developments in the types of sanctions against companies.

In 2014 the Slovak Republic introduced procedural fines for undertakings that obstruct cartel investigations. Since March 2017, the German competition authority can impose fines on the economic and legal successor of the entity whose representatives committed an anti-competitive violation. To stop companies from restructuring and winding down the infringing entity in order to avoid fines, the new provision states that all companies belonging to the same group are jointly liable for the fines imposed.

In Brazil, the Brazilian Competition Authority (CADE) can impose additional sanctions on companies such as i) the registration of the wrongdoer's (company's) name in the National Registry for the Consumer Protection; ii) the company's divestiture, transfer of corporate control, sale of assets or partial interruption of activity.

### Box 8.3. First criminal cartel fine in Australia

In August 2017, after an investigation by the Australian Competition and Consumer Commission (ACCC), the Japanese shipping company Nippon Yusen Kabushiki Kaisha (NYK) was convicted for criminal cartel conduct exercised between 2009 and 2012.

Australia's Federal Court imposed an AUD 25 million fine on the company, which is the second highest monetary penalty ever imposed in Australia for cartel infringements. This fine includes a discount of 50%, due to the fact that NYK pleaded guilty to criminal cartel conduct in July 2016 and co-operated with the ACCC thus avoiding the original AUD 50 million fine.

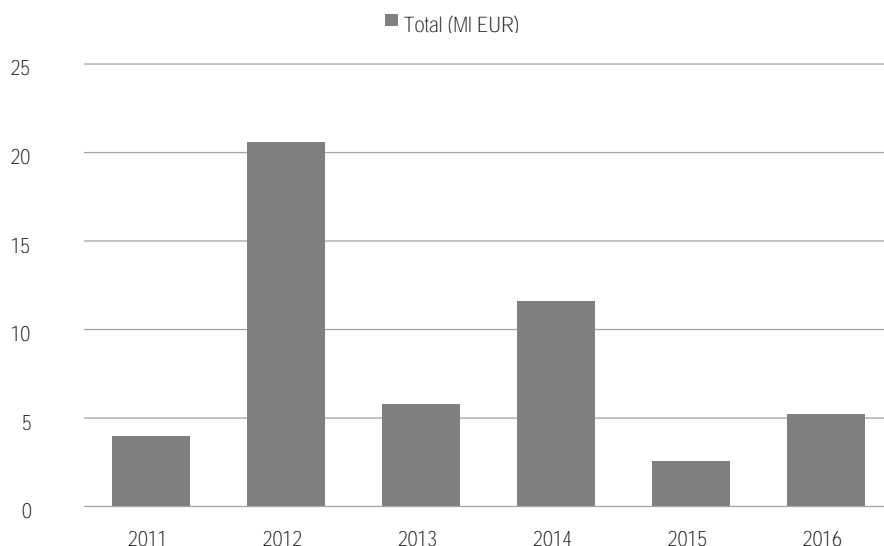
The ACCC reported that *"this is the first criminal charge laid against a corporation under the criminal cartel provisions of the Competition and Consumer Act"* and *"sends a strong warning to the industry and the business community at large"*. The CDPP [Commonwealth Director of Public Prosecutions] and ACCC can and will criminally prosecute cartel conduct".

Source: [www.accc.gov.au/media-release/australia%E2%80%99s-first-criminal-cartel-charge-laid-against-nyk](http://www.accc.gov.au/media-release/australia%E2%80%99s-first-criminal-cartel-charge-laid-against-nyk).

### 8.5.2. Sanctions against individuals

Sanctions against individuals have been increasing since 2005, when the implementation of the Recommendation was last monitored. However, in the last 6 years (criminal and administrative) monetary fines against individuals have been fluctuating considerably, as shown in Figure 8.4.

**Figure 8.4. Total amount of criminal and administrative monetary sanctions against individuals imposed by 14 respondents, between 2011 and 2016**



*Note:* Only 14 respondents replied to the question, as some jurisdictions do not provide for sanctions against individuals, and some others have not imposed any sanctions, in spite of having powers to do so.

The maximum amounts of administrative fines for individuals found guilty of cartel conduct vary among countries. For example, in Australia the court can impose a penalty up to AUD 500 000 while in Bulgaria the maximum fine is EUR 25 000. Chinese Taipei increased administrative penalties in 2015. It added liabilities on members of trade associations who participated in anti-competitive conduct, and extended the time limitation

(deadline) to exercise their power to impose administrative penalties to five years after the conduct occurs; the previous time bar was three years.

Twenty-two out of 42 jurisdictions provide for criminal sanctions against individuals on the basis of the competition law, the general criminal law or the criminal code<sup>4</sup>. Ten additional respondents provide for criminal sanctions against individuals in case of bid rigging<sup>5</sup>. Maximum criminal monetary fines and imprisonment for individuals found guilty of cartel conduct differ considerably among countries, reaching a legal maximum in Canada, of CAD 25 million in fines and 14 years of imprisonment.

In Japan, executives of trade associations or representatives of a company which do not take the necessary measures to prevent an anti-competitive violation such as a cartel, in spite of their knowledge of a plan to breach the Japanese Antimonopoly Act, can be fined up to JPY 5 million (approximately EUR 37 400), while individuals who involved in a cartel can be punished by imprisonment of up to five years or fines up to JPY 5 million.

In the five years between 2011 and 2016, five jurisdictions sentenced at least one individual to jail time.

In 2012 Canada introduced new legislation to block the use of conditional sentences such as community service or house arrest as an alternative to jail time for parties convicted for price fixing, bid rigging or deceptive marketing. Australia introduced criminal sanctions for cartel conduct in 2009. Individuals can face imprisonment of up to 10 years, and fines up to AUD 360 000 as well as community service orders. Corporations are not legally allowed to indemnify their officers against financial penalties, including legal costs.

In addition to administrative and criminal fines and imprisonment, 20 jurisdictions have supplementary types of sanctions against individuals. These consist of: (i) the disqualification of individuals from managerial positions (Australia, Chile, Lithuania, Mexico, New Zealand, Romania, Russian Federation, and the United Kingdom); (ii) business prohibition<sup>6</sup> in Finland; (iii) ban from performing certain functions or undertaking certain activities under both the Criminal Code and the Commercial Code in the Slovak Republic; (iv) suspension of licence in Iceland. In Canada disqualification orders can be incorporated into a plea agreement or a prohibition order. According to the Swedish Trading Prohibition Act, the Swedish Competition Authority (SCA) can issue a trading prohibition (disqualification order) against individuals, either in conjunction with cases concerning competition law fines or on a stand-alone basis. The SCA reported that “a person imposed with a trading prohibition may not run business operations, is prohibited from holding a senior position in a company and may not be employed by or have regular assignments from a closely related party or from the business operation where the person has previously failed to fulfil his or her obligations”.

Brazil listed a number of sanctions available in addition to fines, which can be imposed on individuals for breaches of competition law. These are: i) publication of the infringement decision in a major newspaper at the wrongdoer’s expense; ii) ineligibility of obtaining funding from public banks; iii) registration of the wrongdoers’ names in the National Registry for the Consumer Protection,<sup>7</sup> with potential negative reputational effects; iv) recommendation to the respective public agencies that a compulsory license over the intellectual property rights held by the wrongdoer be granted, when the violation is related to the use of that right; v) recommendation to the respective public agencies that the violator be denied instalment payment of federal taxes owed by him, or that tax incentives or public subsidies be cancelled; vi) prohibition of the wrongdoers from carrying on businesses on their behalf or as representatives of a legal entity for up to five years.

#### Box 8.4. Sanctions in Spain: the adult diapers cartel case

In 2016, the Spanish National Authority for Markets and Competition (CNMC) imposed for the first time individual fines on four executives who directly participated in a cartel in the market for adult diapers funded by the Spanish National Health Service (case S/DC/0504/14 AIO). The cartel involved several manufacturers grouped together as Grupo de Trabajo de Absorbentes of FENIN (A&A -now P&G ESPAÑA, INDAS, SCA, HARTMANN, ONTEX -now ONTEX ID, TEXPOL/ALBASA and BARNA IMPORT) and price fixing was achieved with the collaboration of the trade association FENIN.

The case was detected thanks to the leniency application by one undertaking.

In addition to the four executives, fines were imposed against eight companies and one trade association. A EUR 68 million fine was waived for the leniency applicant. This decision was considered an important step towards increased deterrence of cartel conduct.

Source: [https://one.oecd.org/document/DAF/COMP/AR\(2017\)15/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2017)15/en/pdf)

#### Box 8.5. Criminal cartel offence in the United Kingdom

The United Kingdom introduced important changes to the criminal cartel offence through Section 47 of the Enterprise and Regulatory Reform Act 2013 (ERRA13). One of the amendments removed the requirement of ‘dishonesty’ as a criterion to be assessed when prosecuting an individual for cartel activity.

The Competition and Markets Authority (CMA) notes that “*the cartel offence originally required the individual to have acted dishonestly. Dishonesty as an element of the offence has been removed, and statutory exclusions and defences have been added*”.

The amendment was based on the view that the dishonesty element is difficult to demonstrate and would considerably increase uncertainty in prosecutions for the cartel offence. The changes introduced by ERRA13 aim to increase prosecution and conviction of individuals involved in cartel activity.

Sources: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288648/CMA9\\_Cartel\\_Offence\\_Prosecution\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/288648/CMA9_Cartel_Offence_Prosecution_Guidance.pdf); [www.lexology.com/library/detail.aspx?g=81c942a1-0388-4f6f-bb82-986b3ff24467](http://www.lexology.com/library/detail.aspx?g=81c942a1-0388-4f6f-bb82-986b3ff24467); [www.legislation.gov.uk/ukpga/2013/24/section/47/enacted](http://www.legislation.gov.uk/ukpga/2013/24/section/47/enacted)

#### 8.5.3. Sanctions for bid rigging

Bid rigging, occurring when bidders agree among themselves to eliminate competition in the procurement process, presents specificities which merit separate attention.

Nine respondents (Belgium, Colombia, Croatia, Finland, Germany, Hungary, Italy, Poland and Turkey), which have otherwise an administrative enforcement system for cartel offences, treat bid rigging as a criminal offence, as they are considered to be the most serious cartel offence. The 2009 amendment to the Canadian Competition Act brought the maximum terms of imprisonment for bid rigging up to 14 years, in line with the most serious kind of fraud prohibited by the Criminal Code.

In the Slovak Republic, Hungary, Brazil, Italy, Peru, Turkey, Colombia and Canada undertakings guilty of having taken part in bid rigging activities can be disqualified from future public procurement procedures.

#### 8.5.4. *Is the sanctions regime adequate?*

The majority of respondents consider that their current legal framework for sanctions against companies and individuals is adequate in terms of the level and types of sanctions that it allows.

Still, 9 out of 42 respondents consider that sanctions for hard core cartels are insufficient in terms of either the level of fines, the types of sanctions available, or both.

In particular, Australia observed that pecuniary penalties are too low, especially for large companies. According to the ACCC's response, fines are not in line with those of similar jurisdictions and can be ultimately insufficient, although the criminal cartel provisions introduced in 2009 can be a significant deterrent. Denmark underlined a similar concern of low fines, which is believed to be counterbalanced by the possibility of imprisonment and the resulting considerable deterrent effect. Finland explained that, when the infringer is an association of undertakings, the basis for calculating the fine is in most cases the turnover of the association itself as a legal entity and not the turnovers of the association's members, which can lead to insufficient fines.

Ukraine and the Czech Republic likewise reported an inadequate level of penalties. The Czech competition authority links the modest results of its leniency programme to the low threat effect of fines. Italy reported that pecuniary fines imposed on undertakings are "unlikely to prove autonomously sufficient to deter anti-competitive conduct". Italy is thus considering expanding the scope of non-pecuniary sanctions for individuals, such as disqualification from managerial positions.

#### **Box 8.6. Liquid Crystal Display (LCD) price fixing case**

In 2012, the US Department of Justice Antitrust Division (DoJ) won guilty verdicts against the Chinese Taipei company AU Optronics Corporation, its US subsidiary AU Optronics Corporation America and two top executives, for price fixing of LCD panels. The cartel had affected the US and European markets between 2001 and 2006. The District Court of San Francisco imposed a USD 500 million criminal fine against AU Optronics Corporation, while the executives received three years of imprisonment and a criminal fine.

AU Optronics Corporation was also sentenced to print advertisements in three major trade publications in the United States and Chinese Taipei, acknowledging the charges and sanctions, and the remedial steps it has taken. The company and its US subsidiary were also placed on probation for three years, required to adopt an antitrust compliance programme and to appoint an independent corporate compliance monitor.

Both the European Commission and the DoJ investigated the LCD cartel, which worldwide resulted in a total of USD 1.39 billion criminal fines and 22 executives charged. 13 pled guilty or were convicted while 5 are fugitives.

As stated by the DoJ in its response to the survey, "the convictions were sustained on appeal and reaffirm prior court rulings that price-fixing cartels that involve and significantly affect US commerce cannot escape the reach of US antitrust enforcement by operating overseas".

Source: [www.jdsupra.com/post/contentViewerEmbed.aspx?fid=23cb5f9e-6a88-4299-80c4-347def1d3b5c](http://www.jdsupra.com/post/contentViewerEmbed.aspx?fid=23cb5f9e-6a88-4299-80c4-347def1d3b5c), <https://archives.fbi.gov/archives/sanfrancisco/press-releases/2012/taiwan-based-au-optronics-corporation-sentenced-to-pay-500-million-criminal-fine-for-role-in-lcd-price-fixing-conspiracy>



### 8.5.5. *Some frameworks for cartel sanctions are under review*

Some jurisdictions are considering reviewing their sanctions regime to increase the level of fines and/ or introduce criminal sanctions.

The Czech Republic is in the process of developing new guidelines to provide for higher fines.

In Japan an increase of the current level of fines was suggested by the Japan Fair Trade Commission study group on the Antimonopoly Act.

Belgium is considering raising the cap for fines to 10% of the worldwide turnover of the cartel member.

In Colombia, the Superintendence of Industry and Commerce (SIC) is participating in the drafting of a new bill which, among other things, will reform the sanctions regime. As described in SIC's response to the survey, the new bill will allow "*capping the maximum fine for anti-competitive practices at 10% of the overall annual turnover of the company, instead of keeping current limits, which cap the maximum fine to a specific number of minimum wages*". The bill will include a provision allowing SIC to exclude the party found guilty of taking part in bid rigging activities from contracting with any government agency for a period up to five years.

In Costa Rica, a reform of the Competition Act is currently making its way through Congress. The relevant legislative proposals foresee the imposition of larger penalties for hard core cartels, the implementation of an enforcement procedure better suited to the investigation of competition law infringements, and the reinforcement of the autonomy and resources available to the competition agency, COPROCOM. COPROCOM reports that the aim of this reform is to "strengthen institutional design and provide necessary tools for effective enforcement of competition law".

Based on the survey responses, the sanctions systems and practice of competition authorities suggest strong enforcement and efforts towards increasing deterrence, through different means. Since 2005 not only have several jurisdictions increased their fines against companies and individuals participating in hard core cartels, but new types of sanctions have also been introduced.

This process is still ongoing. Many jurisdictions are looking at more effective ways of addressing, penalising and ultimately deterring cartel activity, and, more broadly, enhancing enforcement.

## 8.6. Conclusions and steps forward

Sanctions have the dual role of deterring future cartels and incentivising prompt reporting of current cartels to competition authorities, within the framework of leniency programmes and/ or plea bargaining and settlement processes.

There are two main issues affecting the adequacy of sanctions: whether a country's competition law permits sanctions that are sufficiently high to take away the prospect of gain from cartel conduct; and, if the laws are adequate, whether sanctions are actually imposed and are large enough (OECD, 2002<sup>[19]</sup>)

OECD research and roundtables since the adoption of the Recommendation show that one type of sanction on its own (civil/ administrative versus criminal, monetary versus non-monetary, against companies versus against individuals) may not be a sufficiently strong

deterrent. A combination of them might however work. Each jurisdiction determines its own combination of sanctions likely to have the most effective deterrent effects against cartels, depending on a number of factors, including the jurisdiction's cultural and legal environment, its enforcement history in cartel cases, the relationship between a competition authority and courts and prosecutors, as well as the institutional powers and resources of the competition authority (OECD, 2003<sup>[23]</sup>) (OECD, 2016<sup>[58]</sup>).

A greater level of detail in the Recommendation would promote compliance with competition law objectives. The Recommendation could refer to the dual role of sanctions as deterrent and incentive to defect from the cartel and co-operate with the competition agency. The Recommendation could mention sanctions against individuals, and recommend considering a combination of sanctions (civil, administrative and/ or criminal, monetary and non-monetary) to achieve an adequate deterrent effect.

## Notes

<sup>1</sup> According to ICN (2010: 6), almost all of the OECD jurisdictions have increased penalties against cartels over the last ten years.

<sup>2</sup> OECD projects assessing national or sector-specific public procurement rules and practices against the Recommendation of the Council on Fighting Bid Rigging in Public Procurement are here: [www.oecd.org/daf/competition/fightingbidrigginggovernmentcontractsmexico-oecdpartnership.htm](http://www.oecd.org/daf/competition/fightingbidrigginggovernmentcontractsmexico-oecdpartnership.htm)

<sup>3</sup> In the same discussion, speakers from the business community noted that once fines reach a level that is high enough for management to take compliance seriously, making them even higher will not increase deterrence. Ever-higher fines also raise questions about the proportionality of the punishment relative to the harm caused by the violation. (OECD, 2015<sup>[61]</sup>)

<sup>4</sup> The 18 Members that have criminal sanctions against individuals are: Australia, Canada, Chile, Denmark, Estonia, France, Greece, Iceland, Ireland, Israel, Japan, Korea, Mexico, Norway, Slovak Republic, Slovenia, United Kingdom and the United States (Secretariat's own research).

<sup>5</sup> The 10 Members that have criminal sanctions against individuals in the case of bid rigging (but not for other cartels) are: Austria, Belgium, Czech Republic, Finland, Germany, Hungary, Italy, Poland, Portugal and Turkey (Secretariat's own research).

<sup>6</sup> It may be ordered "*upon an individual who commits a material breach of the legal obligations pertinent to their business activities*".

<sup>7</sup> Registration of the wrongdoers' names in the National Registry for Consumer Protection is foreseen in Article 38 of the Brazilian Competition Law (Law 12,529/2011) as one of the possible penalties imposed on individuals or companies which infringe the law. However, the Registry is still in process of regulation and is not operating so far. The Brazilian competition authority, CADE, holds a database with the wrongdoers to whom this penalty applies. Once the Registry is launched, the details of the wrongdoers will be registered and publicised. The main effect of this registry is expected to be negative reputational effects.

## Chapter 9. Private enforcement

### 9.1. Background

Private enforcement refers to claims for compensation or injunctive relief, brought by victims of cartels against cartel members. These victims can be individual consumers, companies, organisations or public entities (such as a government department or a procurement agency who is a victim of bid rigging).

The importance of allowing private claims and granting compensation to injured private parties is twofold: (i) it compensates the actual victims of cartels for the damages incurred; (ii) it helps prevent cartels from forming in the first place, as compensation can significantly increase the cost of participating in a cartel and is thus a deterrent.

Public enforcement by government, through competition authorities and the courts, helps private claimants to bring so-called follow-on actions (i.e. claims brought after a competition authority has established the infringement) based on the findings of the competition authority and the evidence that the competition authority collected. Public enforcement can thus be essential in establishing causation and the quantum of harm in private claims (OECD, 2015<sup>[28]</sup>).

Therefore, public and private enforcement against cartels are integrated policy tools, which contribute to the complementary goals of deterrence of competition infringements, compliance with the law and compensation of harm (OECD, 2015<sup>[28]</sup>).

The Recommendation does not refer to compensation claims. However these have considerably picked up in both law and practice since its adoption.

### 9.2. Developments 1998 - 2016

A few OECD jurisdictions have had rules on private enforcement for some time. Private competition law actions are most prevalent in Canada and, in particular, the United States, where the financial impact of private damages exceeds that of the fines imposed via public enforcement. A 2008 study of 40 of the largest successful private antitrust actions in the United States since 1990 found that when only the cases that also resulted in a criminal fine or prison sentence were counted, they netted a total of between USD 6.2 and 7.5 billion in damages. In contrast, the total of all criminal antitrust fines imposed in cases brought by the US Department of Justice since 1990 was USD 4.2 billion (Lande, 2008<sup>[63]</sup>) (OECD, 2011<sup>[60]</sup>).

A 2015 roundtable on the Relationship between Public and Private Antitrust Enforcement showed that the experiences with private enforcement within OECD Members and Participants are uneven. Some jurisdictions, in particular the United States, have substantial experience in private enforcement, which is viewed by them as an important financial deterrent to cartel conduct<sup>1</sup>.

In recent years, Germany, the Netherlands, the United Kingdom and the European Union have adopted measures to promote private enforcement, with positive results. Measures

include giving plaintiffs easier access to evidence; alleviating the burden of proof on the existence of illegal conduct and the quantification of the damage suffered; and the availability of collective redress mechanisms such as class actions. In parallel, there are more private enforcement actions in Brazil, Korea, Japan, and China.

Most private actions are follow-on actions (thus not standalone lawsuits, brought without relying on a previous finding of competition infringement by competition agencies), indicating the important synergies of public and private enforcement. In a number of jurisdictions the findings of authorities in public enforcement cases are not legally binding, but they are relied on and accepted by the courts. This is useful: aligning findings in public and private enforcement helps cases end with consistent outcomes (OECD, 2015<sup>[28]</sup>).

There are several complexities of private antitrust enforcement. Civil procedure (tort) rules in general apply meaning that plaintiffs must provide evidence of the illegal conduct and the harm suffered from such conduct, and must establish the amount of the damage and the causal link between the conduct, the harm and the damage. This is difficult, as competition cases are particularly fact-intensive and characterised by a structural information asymmetry: the information required to support a private claim is generally in the possession of the defendant, while certain information in the files of the competition authority is protected and cannot be disclosed. This means that private parties, final consumers in particular, may be unable to produce evidence and precise estimations at a sufficient level to win their case.

Conversely, it is important not to jeopardise on-going investigations, leniency programmes and settlements by providing full access by private plaintiffs to the files of competition agencies. There is need for clear discovery rules to help to ensure easier access to evidence and, at the same time, protect confidential information (in particular leniency and settlement statements) from disclosure. The final decision on whether and what information should be disclosed is usually up to courts which can decide case-by-case the balance between the public and private interests. Courts can consider whether the information sought was provided by an informant or leniency applicant, whether the disclosure of that information will discourage future informants and the legitimacy of the private plaintiff's interest for disclosure. Clear access rules create legal certainty (OECD, 2015<sup>[28]</sup>).

It is expected that private enforcement will increase in many OECD jurisdictions after the transposition of EU Directive 2014/104/EU on antitrust damages actions <sup>2</sup> (the EU Damages Directive). The EU Damages Directive aims to remove the main obstacles to the process of claiming compensation before national courts setting out “*certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm*”. The EU Damages Directive sets forth common standards for disclosure of evidence, limitation periods, passing-on defence, standing of indirect purchasers, quantification of harm, joint liability, dispute resolution, and the effect of national decisions.

Under the EU Damages Directive, leniency statements and settlements submissions cannot be disclosed. Documents prepared for the purposes of the investigation are temporarily embargoed and can only be made available when the proceedings are closed. Pre-existing materials and all other information are disclosable. The categorisation aims to help the courts to decide whether the information is to be disclosed or not.

**Table 9.1. Access rules under the EU Damages Directive**

Degree of protection	Types of documents	Degree of protection and earliest moment of possible disclosure
Black list Art.6.6 Art.7.1	Documents whose disclosure could jeopardise public enforcement efforts, specifically: - Leniency statements; - Settlement submissions	<b>'Absolute' protection:</b> they are never disclosable by court order
Grey list Art.6.5 Art.7.2	Documents prepared for the purpose of the investigation, such as: - Replies to requests for information; - Statements of Objections; - Preliminary assessments (under Article 9 of Regulation 1/2003)	<b>Temporary protection:</b> Disclosable by court order only after the authority in question has taken a decision in the case or closes the proceeding
White list Art.6.9 Art.7.3	Pre-existing materials not prepared in connection with the investigation, such as: - Written agreements; - Texts of e-mails; - Minutes of meetings	<b>No protection:</b> Disclosable by court order at any time

Source: (OECD, 2015<sup>[28]</sup>)

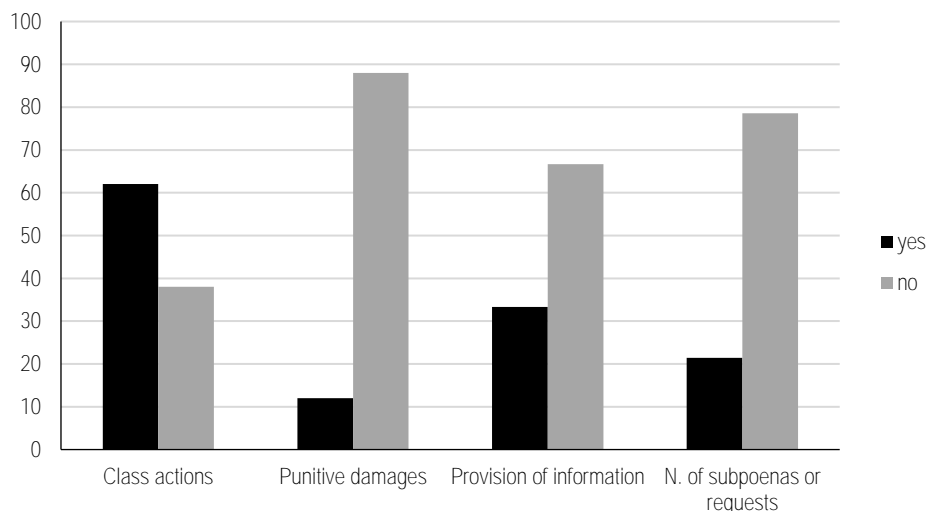
### 9.3. Results of the Survey on private enforcement

The survey sought to ascertain the level of private enforcement concerning hard core cartels, such as the number of actions, existence of collective redress mechanisms like class actions, and the relationship between the competition authorities and the courts, in particular subpoenas or requests from courts to provide information or opinions in cases involving hard core cartels.

Survey results show that all respondents have, or are in the process of implementing, laws that allow private enforcement against hard core cartels, and enable private parties that have suffered harm to bring claims for damages. Yet, the vast majority of respondents consider that private enforcement against hard core cartels in their jurisdiction is still rare.

One exception is the United States, where the private enforcement system is very active and allows private plaintiffs to seek treble damages, i.e. punitive compensation that exceeds the harm actually suffered. According to the US Supreme Court, “*by offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general’*”. This rule, together with the United States class action system, incentivises private actions and works as a significant deterrent against the formation of cartels. In the United States private enforcement system, the States which have been harmed by cartels can also sue for damages, just like private parties. In the past decade (2005-2016), the number of private cases filed each year ranged from 500 to over 1 300. In major cartel cases, the damages recovered on behalf of US consumers sometimes exceed the fines imposed in Department of Justice Antitrust Division (DoJ) prosecutions. Most of this recovery goes to victims (OECD, 2015<sup>[64]</sup>).

**Figure 9.1. Percentage of respondents who reported having class action mechanisms, punitive damages, provision of information to courts and having received requests from courts**



*Note:* Responses to questions 3.2, 3.3, 3.4. Class actions include any collective redress mechanisms available for private actions for damages caused by hard core cartels. Punitive damages consist of compensation for damages caused by hard core cartels that exceeds the harm actually suffered. Requests from and provision of information to courts include subpoenas or requests to provide information or opinions in private enforcement cases.

Figure 9.1 shows that 26 out of 42 respondents (62%) stated that class actions or other collective redress mechanisms are available for damages caused by hard core cartels. A small number (around 10%) of jurisdictions (Chinese Taipei, New Zealand, Turkey, and the United States) allow plaintiffs to seek punitive damages.

9 out of 42 respondents (22%) stated that they have received at least one subpoena or request for information from courts. However, 42% of respondents do not track such data.

Many jurisdictions saw changes in the last years which aim to improve the use and level of private enforcement. In 2013, the Canadian Supreme Court established the right for private damages not only for direct but also for indirect purchasers (i.e. downstream buyers that did not directly purchase from the undertaking involved in the cartel infringement). Since 2016, in the Czech Republic parties harmed by hard core cartels can claim compensation not only for the actual loss suffered by also for lost profits, plus interest.

In Peru no private actions had been filed since 2008, when private actions were made possible by law. In order to enhance private litigation, in 2015 the law established the possibility for the competition authority itself to file class actions “*in defence of diffused interests and the collective interests of consumers*”. The ACCC also responded that one way to enhance private actions would be for the agency to seek damages on behalf of victims of the anti-competitive conduct, such as consumers or small businesses.

As part of the recent review of competition policy<sup>3</sup> in Australia, the government accepted<sup>4</sup> three recommendations by the review panel, aimed at reducing the obstacles faced by private litigants, namely: i) remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions; ii) remove limits concerning the possibility of using admissions of fact made by the person against whom the proceedings

are brought, in addition to findings of fact made by the court, as *prima facie* evidence in subsequent proceedings; iii) improve small businesses' access to remedies.

The ACCC expressed some concerns with regard to an increased use of private enforcement, i.e. “*that firms will be less likely to come forward to seek immunity and co-operate with the ACCC under its immunity policy if there is an increased potential for the admissions they make to be used against them in follow-on proceedings*”. This view is echoed by Brazil, which underlines that some aspects of private enforcement, especially regarding access to confidential documents, might affect the leniency programme.

Eleven respondents reported that they found their level of private enforcement as adequate, while 21 reported it as inadequate. According to the responses, reasons for low private enforcement can be the high standard of proof required of plaintiffs, the lack of awareness on the availability of private enforcement for victims of hard core cartels and the low access to evidence. Lesser disincentives are the cost of bringing an action, the difficulties of quantifying the damage and the limitation period for private actions.

Italy suggested that “*collective redress mechanisms should be complemented by more user-friendly and efficient small claims courts, with a view to ensuring that consumers have the right incentives to seek for damages*”.

The European Commission underlined that the EU Damages Directive has been implemented by EU Member States only recently and therefore it is not yet possible to observe its full effect. Indeed, the majority of EU countries who expressed low satisfaction with their current level of private enforcement responded that they expect improvements after the transposition into their domestic law of the EU Damages Directive. To provide support for national courts and parties, the European Commission has issued a Recommendation on collective redress (2013/396/EU)<sup>5</sup>, and a Commission Communication (2013/C 167/07)<sup>6</sup> as well as a practical guide on quantifying harm in damages actions (C(2013) 3440).<sup>7</sup>

#### 9.4. Conclusions and steps forward

The Recommendation does not refer to private damages actions as a means for companies and individuals who have suffered harm from cartels to obtain actual compensation. However, there is a trend for more compensation claims, and an acknowledgement that general civil procedure rules are not always suitable for antitrust cases, which require protection of leniency and settlement documents held by competition authorities. Back in 2002, the OECD had already identified the need to explore “*means for permitting cartel victims to recover monetary damages from cartel operators, consistent with a country's legal norms*” (OECD, 2003<sup>[3]</sup>).

The Recommendation could be revised to include a recommendation of providing for private enforcement, and of the need to make sure that public and private enforcement rules and practice work together without one jeopardising the other. The role of competition authorities in resolving tensions between private and public enforcement are often limited, as they have little influence over procedural rules, including rules concerning the gathering of evidence (OECD, 2005<sup>[4]</sup>). It would therefore help if the Recommendation included some guidance in this regard. Specifically, it could be recommended to:

- Establish rules that enable parties to access the evidence necessary to bring a claim for compensation

- Protect leniency statements as well as settlements submissions from disclosure to ensure the right balance between public enforcement by competition authorities and private enforcement by victims of cartels
- Allow private enforcement actions that do not follow on infringement decisions by competition authorities, so as to allow enforcement in cases where there is no prior decision
- Introduce collective redress mechanisms, which allow groups of claimants to request compensation collectively
- Grant adequate probative value to final infringement decisions by competition authorities, in private enforcement actions concerning the same hard core cartel;
- Suspend private enforcement limitation periods for the duration of the investigation by the competition authority.

## Notes

<sup>1</sup> The United States have a system based on actions for treble damages, opt-out class actions, jury trials, contingency fee agreements, an extensive discovery system and the exclusion of the passing-on defence.

<sup>2</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L329/1, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN>

<sup>3</sup> 2015 Harper Competition Policy Review: [www.australiancompetitionlaw.org/reports/2015-harper-recs.html](http://www.australiancompetitionlaw.org/reports/2015-harper-recs.html)

<sup>4</sup> Competition and Consumer Amendment (Competition Policy Review) Bill, [www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r5851](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5851)

<sup>5</sup> Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN>

<sup>6</sup> Communication from the Commission on quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:167:0019:0021:EN:PDF>

<sup>7</sup> Practical Guide “Quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the Functioning of the European Union”, accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the Functioning of the European Union {C(2013) 3440} [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_guide\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf)



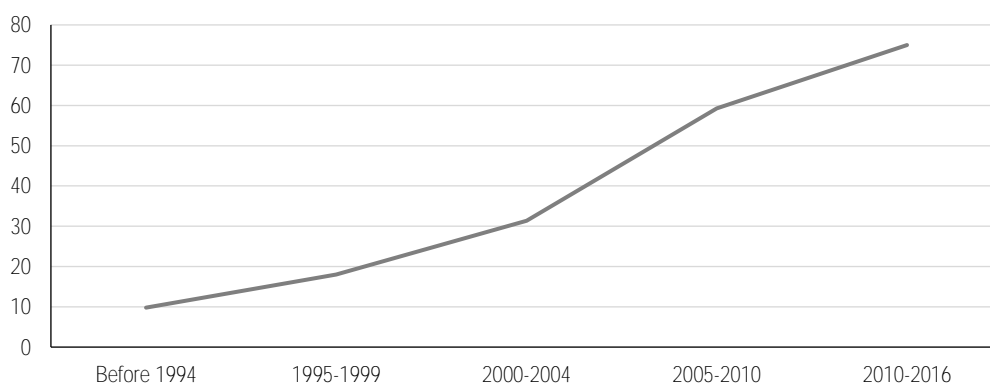
## Chapter 10. International co-operation in cross-border cartels

### 10.1. Background

The Recommendation encourages Adherents to co-operate with one another in preventing hard core cartels, and stipulates that “...Member countries’ mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process”.

Cartels exist in a wide array of industries and markets, and often have a cross-border dimension, due to the increasing globalisation of production and distribution chains.

**Figure 10.1. Number of international cartels detected**



*Source:* (OECD, 2016<sup>[6]</sup>) The OECD calculations are based on the Private International Cartels database prepared by Professor John Connor. Starting in 2018, the OECD will verify and update this database.

The growing number of international cartels has led to increased attention to co-operation and co-ordination among competition authorities. In cases when a cartel affects more than one jurisdiction, successful prosecution may depend on the ability of the involved competition agencies to co-operate in their investigation, as evidence and witnesses may be scattered across countries beyond the jurisdictional reach of any single competition agency.

Co-operation is not only needed to enable foreign authorities to investigate. Lack of co-ordination of enforcement actions against the same cartel by different authorities also risks jeopardising enforcement outcomes; for example early dawn raids in one country alert the cartel to the possibility of dawn raids in other countries and may lead to the destruction of evidence. Lack of co-operation in cross-border cases also duplicates the investigative efforts of the authorities, generates unnecessary regulatory costs for businesses<sup>1</sup> and creates a risk of divergent decisions. In particular not taking into account sanctions already

imposed for the same conduct overseas risks double jeopardy (companies getting punished twice for the same cartel conduct) (OECD, 2015<sup>[12]</sup>).

The OECD has played a leading role in the policy development of international co-operation in cross-border cases, including cross-border cartels. Its long experience in the area culminated in the adoption in 2014 of the Recommendation on International Co-operation (OECD, 2014<sup>[5]</sup>).

The Recommendation on International Co-operation includes very detailed provisions on international competition enforcement co-operation, and instructs the Competition Committee to monitor its implementation and report to the Council every five years, i.e. in 2019/2020 for the first time. The monitoring report is likely to be detailed and cover matters that apply to international cartels. This draft report will therefore be limited to summarising OECD work and detailing developments specific to cartels. It will not provide a detailed comprehensive overview of competition enforcement co-operation matters.

## 10.2. Developments 1998 – 2016

### *10.2.1. Exchange of information and investigative assistance*

Co-operation among competition authorities and sharing of information is important for detecting, investigating, and prosecuting international cartels. It can be informal and formal.

In most cases, there are informal communications between competition agencies that can be case-specific (on matters such as investigative strategies, market information and witness evaluations) but not involve sharing evidence that has been generated by an investigation.

Occasionally, the competition agency of one country may make a formal request, usually in writing, for information about a particular case or for assistance in gathering evidence that may exist in the requested country a) asking another authority to gather information on its behalf on a particular case, using compulsory process if necessary, and/or b) asking that the requested authority share with it relevant confidential or non-confidential information that is in its files or to which it has access (OECD, 2003<sup>[3]</sup>). Exchange of confidential information, in particular, is formal and usually needs to be made possibly through enabling legislation.

The right mix of formal and informal co-operation differs between competition authorities and jurisdictions, and depends on the availability of formal instruments, contacts with the other involved authorities and the specific circumstances of the investigated case.

Since the adoption of the Recommendation significant efforts have been made to improve formal and informal international enforcement co-operation and co-ordination.

The 2000 report to Council on the implementation of the Recommendation found limited co-operation among competition authorities in hard core cartel cases, due to formal legal restrictions on sharing information with, and gathering information on behalf of, foreign competition authorities, as well as due to practical difficulties. The report noted that while confidential business information -including business secrets and other commercially sensitive information- should be protected from improper disclosure or use, most countries impose restrictions that go beyond providing such protection. The report also noted that co-operation and information exchanges are beneficial in the long run even if they do not produce tangible benefits in every instance (OECD, 2000<sup>[2]</sup>).

The 2003 Report found a lower degree of formal international co-operation than desired. It noted however that informal co-operation was more common and reported as “*quite useful*”, no doubt because it is easier to give and receive and not subject to specific legal constraints.

The 2003 Report noted that many countries do not allow the sharing of confidential information from an agency's investigation files, nor do they permit an agency to use its compulsory information-gathering powers on behalf of a foreign competition agency. Still, there were several successful formal requests between the United States and the European Union in the 1999-2001 period. The requests concerned sharing information in the files of the requested competition authority and documents, including those seized in a search or dawn raid, assistance in obtaining testimony or information from a witness, and information regarding the evaluation of a case or a market.

The Competition Committee acknowledged that unwarranted dissemination of confidential information can be harmful and that the authority sharing the information should ensure that adequate means exist in the requesting country for protecting the information against unauthorised disclosure. Still, restricting the sharing of information should not go beyond what is required to protect legitimate business interests (OECD, 2003<sup>[3]</sup>).

The 2005 last report to Council on the implementation of the Recommendation found an increasing trend in cross-border co-operation. More competition authorities co-operated by exchanging knowhow and expertise in cartel enforcement, in particular regarding techniques. Co-ordinated, simultaneous surprise inspections in several jurisdictions had been conducted successfully. Confidentiality waivers in cases of simultaneous leniency applications had created opportunities for multi-jurisdictional co-operation. In several cases, countries were able to assist others in providing access to evidence and witnesses located in their jurisdictions. However, co-operation still did not usually involve formal exchange of confidential information (OECD, 2005<sup>[4]</sup>).

To overcome the difficulties in the exchange of confidential information, the Competition Committee adopted “*Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations*” in 2005 (OECD, 2005<sup>[64]</sup>). The Best Practices contain practical guidance for competition authorities seeking to share information with their counterparts including on safeguards, the required authority to share information, and standards for protecting confidentiality and legal privilege.

The Best Practices served as the basis for section VII (*Exchange of Information in Competition Investigations or Proceedings*) of the Recommendation on International Co-operation which, as mentioned in section 10.1, will be monitored in 2019/2020. Therefore, this draft report does not assess compliance with them.

The OECD continued working on international co-operation. In 2012 it held a roundtable on Improving International Co-operation in Cartel Investigations which found that while there were still limitations regarding the exchange of confidential information, experienced authorities were able to co-ordinate investigative steps such as dawn raids and use confidentiality waivers in cases of simultaneous leniency applications. The roundtable noted a strong increase of informal co-operation and exchange of expertise in cartel investigations, including the sharing of leads, discussions about investigative strategy, market information or witness evaluations. Informal co-operation is often based on personal contacts built on trust, established through interactions in conferences, staff exchanges and participation in fora such as the OECD or the ICN. The roundtable noted that often scarce resources are required to respond to a request for information from another

agency and that for any individual request, the costs and benefits of transferring information are unevenly distributed. Thus, commitment to a system of co-operation and information sharing over the long term is necessary to even out and incentivise the use of resources for others (OECD, 2012<sup>[11]</sup>).

In a survey run by the OECD and the ICN in 2013, almost all respondents<sup>2</sup> assessed their experiences with international co-operation as extremely positive. Even if agencies face some costs (especially in terms of resource and time constraints) in relation to international co-operation, respondents thought that overall the benefits of co-operation outweigh the costs. Many suggested that the effectiveness of co-operation should be assessed from a long-term perspective so that immediate costs, although high, could be considered as a form of investment. The responses to the survey indicate approximate increases of 15% in international co-operation in cartel cases for the period 2007 to 2011. (OECD, 2013<sup>[65]</sup>)

**Table 10.1. Experience with international co-operation, by enforcement area, (2007-2011)**

	Number of agencies with any experience	Number of cases reported by agencies				
		2011	2010	2009	2008	2007
Cartel	19	55	51	49	47	48
Merger	21	116	101	106	96	86
Abuse of Dominance	13	29	26	22	22	22

*Note:* The figures refer to cases where some cross-border co-operation took place, based on estimates by the respondents to the OECD/ICN survey.

*Source:* (OECD, 2013<sup>[69]</sup>).

### ***10.2.2. Competition enforcement co-operation agreements and regional co-operation frameworks***

Although authorities do not need specific enabling instruments to work together informally (as well as, sometimes, formally when their laws allow it), they increasingly rely on formal competition enforcement international co-operation instruments. These agreements are entered into to establish a commitment to co-operate, strengthen the scope and degree of co-operation, and, sometimes, depending on their clauses, enable the exchange of confidential information and the provision of investigative assistance to another authority.

International co-operation agreements are concluded between two or more governments, or between two or more competition authorities. While they are not specific to cartel investigations, they also apply to them.

In 2015, the OECD found 15 bilateral government-to-government co-operation agreements where at least one of the signatories is an OECD Member. These agreements govern matters which include most or all of the following: the notification and co-ordination of enforcement actions, enforcement co-operation including exchange of information, positive and negative comity and consultation on cases.<sup>3</sup>

Co-operation agreements between competition authorities (often called Memoranda of Understanding, “MoUs”) are a lot more frequent than inter-governmental agreements. In 2017, the OECD found at least 180 MoUs where one of the signatories is a competition authority of an OECD Member, Associate or Participant to the OECD Competition Committee, or the European Commission.<sup>4</sup> MoUs establish a framework for co-operation, which can range from lean to comprehensive. They usually include clauses on inter-agency communication and/or technical co-operation (like conducting or participating in conferences, seminars, workshops or training courses, exchange of personnel or study trips,

providing assistance in advocacy activities) and, sometimes, on co-ordination of parallel investigations like simultaneous dawn raids in several jurisdictions, and positive and negative comity.

The MoUs include few second-generation agreements, which enable competition authorities to exchange confidential information without the need to seek prior consent from the source of the information.

Mutual assistance and co-operation also takes place in regional multilateral frameworks, such as the European Competition Network, the BRICS regional co-operation (among Brazil, the Russian Federation, India, China and South Africa) and the Nordic Agreement on Cooperation in Competition Cases (Box 10.1).

**Box 10.1. Examples of regional co-operation: the European Competition Network (ECN), BRICS and the Nordic Agreement on Cooperation in Competition Cases**

**The ECN**

The European Competition Network was established with the adoption of Regulation 1/2003. It a forum for close co-operation among national competition authorities of European Union Member States and the European Commission, aiming at providing an effective legal framework to enforce EU competition law in cross-border infringements.

It supports enforcement co-operation in various forms, such as “*informing each other of new cases and envisaged enforcement decisions, co-ordinating investigations where necessary, helping each other with investigations, exchanging evidence and other information; and discussing various issues of common interest*”.

Source: [www.oecd.org/daf/competition/competition-inventory-european-competition-network.pdf](http://www.oecd.org/daf/competition/competition-inventory-european-competition-network.pdf), <http://ec.europa.eu/competition/ecn/>

**The Nordic Agreement on Cooperation in Competition Cases**

On 8 September 2017, the competition authorities of Denmark, Finland, Iceland, Norway and Sweden, signed a new co-operation agreement, which will replace the current Nordic Agreement on co-operation in Competition Cases (of March 2001 and April 2003).

The Nordic Agreement provides an improved framework to co-operate, in particular to exchange information, gather information on behalf of another agency, and assist during dawn raids, thus achieving a more effective enforcement.

Source: <http://www.konkurrensverket.se/globalassets/om-oss/nordic-agreement-on-cooperation-in-competition-cases.pdf>

**The BRICS MoU**

In 2016, Brazil, the Russian Federation, India, China and South Africa signed an MoU, in order to create a framework for multilateral co-operation and to set up an institutional partnership, aimed at “*promoting and strengthening the co-operation in competition law and policy of the Parties through exchanges of information and best practices, as well as through capacity-building activities*”.

Source: <http://www.compcom.co.za/wp-content/uploads/2016/05/MoU-BRICS.pdf>

### 10.3. Results of the 2017 Survey on International Co-operation

The survey sought to collect information about recent developments in international co-operation in hard core cartels cases. It included questions on legal and practical challenges to international co-operation and investigative assistance, the capacity and

powers to provide and obtain investigative assistance, as well as possible ways to enhance co-operation.

Fourteen jurisdictions maintain statistics related to the provision or receipt of investigative assistance to and by their foreign counterparts. Among these, two authorities reported not having had any request for investigative assistance. Globally, responses show that investigative assistance is provided very frequently, mainly informally. There are some cases of formal assistance, too. Examples of (formal and informal) assistance include information requests, the sharing of opinions and views on the enforcement of cases, assistance with dawn raids, witness interviews, exchanges of information, experience or evidence. Box 10.2 highlights specific examples of successful investigative assistance in international cartel cases.

#### **Box 10.2. Examples of successful investigative assistance among competition authorities**

##### **Nishikawa Rubber Co., Ltd. international bid rigging case, co-operation between Canada and the United States**

In 2016, Nishikawa Rubber Co. Ltd, manufacturer of automotive parts, agreed to plead guilty in the United States and pay a USD 130 million fine, after being charged in the United States for taking part in international bid-rigging, which affected the United States and Canada. This was the result of a high degree of collaboration between the Competition Bureau and the Antitrust Division of the United States Department of Justice. Thanks to this co-operation, consistent with the Agreement between the Government of Canada and the Government of the United States of America on the application of positive comity principles to the enforcement of their competition laws, it was possible to conduct an efficient investigation. The remedies imposed addressed the adverse effects of Nishikawa's anti-competitive conduct both in Canada and in the United States.

Sources: [www.canada.ca/en/competition-bureau/news/2016/07/unprecedented-cooperation-with-us-antitrust-enforcement-authority-leads-to-major-cartel-crackdown.html](http://www.canada.ca/en/competition-bureau/news/2016/07/unprecedented-cooperation-with-us-antitrust-enforcement-authority-leads-to-major-cartel-crackdown.html), [www.justice.gov/opa/pr/nishikawa-agrees-plead-guilty-and-pay-130-million-criminal-fine-fixing-prices-automotive](http://www.justice.gov/opa/pr/nishikawa-agrees-plead-guilty-and-pay-130-million-criminal-fine-fixing-prices-automotive)

##### **Manufacturers and traders of fruits and vegetables containers cartel case, co-operation between Italy and Spain**

In 2010, Spain received investigative assistance from the Italian Competition Authority, which carried out inspections, on behalf of the Spanish authority, on companies located in Italy and involved in an infringement in the fruit and vegetable packages' market in Spain. As a result of the investigation the CNC Council imposed fines on two companies for cartel activity.

Sources: [http://ec.europa.eu/competition/ecn/brief/03\\_2010/es\\_inspection.pdf](http://ec.europa.eu/competition/ecn/brief/03_2010/es_inspection.pdf), p.15  
[http://ec.europa.eu/competition/ecn/brief/01\\_2012/brief\\_01\\_2012.pdf](http://ec.europa.eu/competition/ecn/brief/01_2012/brief_01_2012.pdf)

##### **Modelling agencies cartel cases, co-operation among the United Kingdom, France and Italy**

The UK Competition and Markets Authority (CMA) collaborated with the Italian and French Authorities in their respective investigations in the modelling agencies sector. The authorities conducted three separate cartel investigations, concluded in 2016, but liaised with each other throughout. The CMA imposed fines on 5 agencies and their trade associations, the French Competition Authority imposed fines on 37 agencies and the biggest trade union of the sector, and the Italian Competition Authority fined 9 agencies.

Sources: <https://officialblogofunio.com/2017/07/17/competition-authorities-have-a-new-top-model/>  
[www.gov.uk/government/news/model-agencies-fined-15-million-for-price-collusion](http://www.gov.uk/government/news/model-agencies-fined-15-million-for-price-collusion)  
[www.autoritedelaconcurrence.fr/user/standard.php?lang=fr&id\\_rub=629&id\\_article=2869](http://www.autoritedelaconcurrence.fr/user/standard.php?lang=fr&id_rub=629&id_article=2869)  
<http://globalcompetitionreview.com/article/1073779/italy-fines-modelling-agency-cartel>

Respondents described barriers in providing or receiving investigative assistance, and general challenges to effective international co-operation, such as: (i) a lack of co-operation agreements between competition authorities, in particular second generation agreements, or information gateway provisions (both of which enable competition authorities to exchange confidential information without the need to seek prior consent from the source of the information); (ii) difficulties in co-operation and exchange of information between jurisdictions with and without criminal prosecutions for cartels; (iii) strict data privacy laws which impede the exchange of information; and (iv) difficulties in notifying foreign defendants, which can result in procedural deadlocks.

France, Spain and Sweden mentioned as an important barrier to providing and receiving assistance the fact that different agencies might have different investigative powers, especially when it comes to dawn raids and gathering electronic evidence. Brazil, Japan, the Russian Federation and Peru underlined problems linked to exchanging confidential information.

Australia noted the need to establish relationships of trust between agencies. It indicated that some agencies might be unwilling to provide assistance if they do not have an on-going corresponding investigation. Barriers can be due to sensitivities in some jurisdictions, different cultural norms, and unwillingness to provide assistance if legal and confidentiality obligations do not allow it, are not clear, or harmonised; thus harmonisation of laws would help reduce barriers. New Zealand noted that obtaining practical assistance is sometimes complex, especially in relation to the use of agencies' premises or equipment.

The European Commission and Estonia reported that the exchange of documents and information between jurisdictions with and without a criminal enforcement system can be problematic. The 2012 OECD Roundtable on Improving International Co-operation in Cartel Investigations had also highlighted that "criminal jurisdictions can make use of MLATs [Mutual Legal Assistance Treaties] and other formal forms of co-operation in criminal matters, which are unavailable to jurisdictions based on an administrative system of enforcement. On the other hand, competition authorities from administrative jurisdictions are often able to make more extensive use of informal co-operation methods" (OECD, 2012<sup>[11]</sup>).

The United States noted difficulties in obtaining information for criminal cartel investigations from central MLAT (not competition) authorities which do not have experience with antitrust infringements, resulting in long delays. The DoJ has experienced complications linked to the operation of data privacy laws when trying to acquire evidence from companies located in Europe. According to the DoJ, more co-operation between competition authorities and data privacy enforcers could provide transparency on data privacy prohibitions, thus improving companies' understanding of data privacy laws and reducing their apprehension of risks linked to data privacy violations when co-operating in competition investigations. Furthermore, training on formal mutual legal assistance in criminal cartel investigations would be helpful for central authorities, allowing them to better co-operate under Mutual Legal Assistance Treaties.

A number of authorities provided comments on additional arrangements within the agency or, more broadly, initiatives that would be beneficial in order to improve the nature and extent of cross-border investigative assistance and co-operation. The majority suggested that bilateral and multilateral agreements, as well as co-operation instruments which allow for confidential information sharing, are of great value.

Mexico proposed exchange programmes among competition agencies in order to develop international co-operation. South Africa recommended establishing sector specific working groups between agencies, sharing updates on investigations and judgements, and joint research studies. Brazil put forward the idea of a platform for information sharing, including on-going and concluded investigations.

The Russian Federation suggested the creation of a special framework to solve issues related to the exchange of confidential information. Canada and New Zealand mentioned that a more widespread adoption and use of gateway provisions would be highly beneficial for an effective international co-operation.

Some respondents stressed that analysing successful international co-operation in other areas (e.g. in the financial, securities and tax sectors), would help understand how to enhance co-operation in the competition field. For example, Switzerland stated that in the financial sector (and not in the competition one) the Swiss authorities are permitted to exchange information with all countries. Similar responses are provided by the United States, the Russian Federation and Australia. The ACCC detailed the success of the International Organization of Securities Commission's (IOSCO) Multilateral Memorandum of Understanding (MMOU), illustrated in Box 10.3, depicting it as a "potentially a good model for enhancing co-operation in dealing with cross border hard core cartels, particularly in a non-criminal context".

Seven jurisdictions declared to have lower capacity to seek from and provide assistance to counterparts in foreign jurisdictions compared to other investigators of corporate misconduct, such as financial sector and securities regulators.

Around one third of respondents agreed that the capacity and/or limitations to provide and receive assistance in cartel investigations should be specifically covered in the Recommendation.



### Box 10.3. International co-operation under the IOSCO MMOU

The International Organization of Securities Commission (IOSCO) developed a Multilateral Memorandum of Understanding (MMOU) concerning consultation, co-operation and exchange of information.

The IOSCO MMOU allows a high level of co-operation between securities or financial regulators, enabling them to effectively provide mutual assistance. In particular, “*Under the terms of the MMOU, the securities regulators can provide information and assistance, including records:*

- To enable reconstruction of all securities and derivatives transactions, including records of all funds and assets transferred into and out of bank and brokerage accounts relating to these transactions;
- That identify the beneficial owner and controller of an account;
- *For transactions, including the amount purchased or sold; the time of the transaction; the price of the transaction; and the individual and the bank or broker and brokerage house that handled the transaction; and*
- *Providing information identifying persons who beneficially own or control companies;*
- *Taking or compelling a person’s statement or, where permissible, testimony under oath, regarding the potential offence”*

Currently, the IOSCO MMOU has 115 signatories, and a number of information requests which has been constantly increasing since 2003, reaching 3330 requests in 2016.

Source: [www.iosco.org/about/?subsection=mmou](http://www.iosco.org/about/?subsection=mmou)

In summary, there is a trend towards increased investigative assistance and international co-operation in the last decade. Issues remain, essentially linked to: (i) the diversity of legal systems (in particular between criminal and administrative systems); (ii) rules concerning the exchange of confidential information; (iii) different powers of competition authorities; (iv) data privacy laws; and (v) resource prioritisation. The last point was mentioned as an obstacle to effective co-operation by many jurisdictions.

## 10.4. Conclusions and steps forward

International co-operation and co-ordination among competition authorities in cartel investigations has progressed. Importantly, greater trust has been built between agencies facilitating informal co-operation and information sharing. Limitations to the formal exchange of confidential information persist, however. Commitment to a system of (formal and informal) co-operation and information sharing over the long term is still needed.

As the 2014 Recommendation on International Co-operation contains detailed guidance on international enforcement co-operation, it may be useful for consistency purposes to eliminate the section on international co-operation from the Recommendation. The Recommendation on International Co-operation which covers all aspects of international co-operation in competition enforcement, including in hard core cartels cases, can be used instead, without prejudice to any other co-operation under any bilateral or multilateral agreements to which Adherents or competition authorities in them may be parties.

## Notes

<sup>1</sup> The business community has frequently pointed out that investigations by several authorities of the same or related matter often end up with the production by the involved firms of identical sets of information or the collection of statements from the same witnesses on the same questions (OECD, 2014<sup>[24]</sup>).

<sup>2</sup> 57 responses were sent to the OECD Secretariat in response to the Survey. Of these, 55 responses were used. 32 responses came from agencies of 31 OECD Members (58% of the sample); 13 responses came from agencies of Participants (12 of these are included in the sample, 22% of the sample), and 11 responses came from ICN-only agencies (20% of the sample).

<sup>3</sup> [www.oecd.org/daf/competition/inventory-competition-agreements.htm](http://www.oecd.org/daf/competition/inventory-competition-agreements.htm)

<sup>4</sup> [www.oecd.org/daf/competition/inventory-competition-agency-mous.htm](http://www.oecd.org/daf/competition/inventory-competition-agency-mous.htm)

## Chapter 11. Cartel related advocacy

The Recommendation does not mention competition advocacy explicitly. Advocacy is nevertheless an integral part of effective cartel enforcement and will enhance the effectiveness of cartel deterrence as well as improve cartel detection.

A commonly used definition for competition advocacy is: “*Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.*” (ICN, 2002, p. i<sub>[67]</sub>)

Advocacy related to cartels has a narrower focus, but is an important part of the overall advocacy efforts of any competition agency.

### 11.1. Developments 1998 - 2016

The OECD recognises the importance of cartel related advocacy: “Toward the goal of enhancing public support *for the anti-cartel effort, responsible officials should consider*

- *conducting expanded and vigorous "public relations" campaigns designed to inform consumers, businesses and governments of the nature of cartels and the dangers that they pose;*
- *focusing on quantifying and publicising the harm that results from the cartels that they prosecute, even if such calculations are not necessary to prove their case.*” (OECD, 2003, p. 45<sub>[3]</sub>)

Most of the advocacy related work that was done by the OECD since has focused in particular on various methods of communication to governments and public procurement officials, while at the same time exploring options for advocacy to a wider range of stakeholders. The ICN has provided in-depth insights into cartel advocacy activities directed to a wider audience such as the business community; consumers; professional organisations and trade unions; chambers of trade, commerce or industry; academia; and the media.

The 2005 report (OECD, 2005, p. 18<sub>[4]</sub>) describes the Competition Committee’s expectations with regard to cartel advocacy: “*Where the general public and in particular lawmakers are educated about the harm cartels cause to economies and the benefits of robust anti-cartel enforcement, they are more likely to support competition authorities and provide them with the necessary enforcement tools, including the ability to impose significant sanctions that can effectively deter cartels. Moreover, the more the business community and their counsel are aware of anti-cartel efforts, sanctions that can be imposed, and leniency programmes, the more likely it is that businesses will comply with the law or, where cartels have been formed, inform the competition authority about them.*”

A roundtable (OECD, 2004<sub>[67]</sub>) explored the topic and discussed methods that can be used to educate the public about cartels, including outreach to stakeholders, speeches, publications, websites, and pro-active media relations, and most importantly aggressive anti-cartel

enforcement that receives good press coverage and public attention. This roundtable pointed out that, while presentations to core constituents as well as active media relations programmes are important components of programmes to raise public awareness of cartels, active cartel enforcement, in particular successful cases against cartels that have a direct impact on consumers' pockets, is the most important and effective tool. At the same time a good cartel case does not necessarily need high fines or high volumes of affected commerce for effective advocacy purposes. When consumers are directly affected and can experience the benefits of anti-cartel enforcement in their own wallet, small cases can have high impact.

The complementarity of vigorous enforcement and cartel advocacy was also pointed out in the 2010 discussion on strategies for competition advocacy (OECD, 2010<sup>[69]</sup>) at the Latin American and Caribbean Competition Forum. Neglecting the advocacy aspect of a competition authority's mandate may have negative consequences for its enforcement function in view of the mutually reinforcing nature of these activities, and *vice versa*. Thus, an agency should seek to maximise the effectiveness of both tools taken together, always depending on the available resources.

#### Box 11.1. Simultaneous advocacy and enforcement action

Advocacy and enforcement activities do not merely overlap; rather, they can reinforce each other. For example, in 2015 the United Kingdom Competition and Markets Authority (CMA) found that an association of estate and letting agents, three of its members and a newspaper publisher had infringed competition law in the advertising of estate agents' fees, imposing penalties of over GBP 735 000.<sup>1</sup> This was followed up by extensive compliance work to raise competition law awareness in the property and newspaper industries. This work in turn generated a further enforcement case, where in 2017 the CMA fined six estate agents over GBP 370 000 for agreeing minimum commission rates<sup>2</sup>, as well as securing the disqualification of two company directors.<sup>3</sup>

Similarly, following its investigation of a cartel relating to sales of posters and frames by two competing online sellers on Amazon's UK website, which resulted in a fine and a director disqualification,<sup>4</sup> the CMA undertook a campaign to help online sellers understand how to avoid breaking UK competition law. This included a 60-second summary that provided concise guidance to businesses on the risks of online price-fixing along with a case study which helped to reach a much wider audience. In addition, the CMA also wrote to a number of online companies reminding them of their obligations under competition law and also engaged with online marketplace providers which has helped make the CMA's advice available to online sellers that use their platforms.

Among the CMA's other cartel-related advocacy work, in 2018 it ran a second 'stop cartels' online marketing campaign, encouraging people to be 'safe, not sorry' and to 'do the right thing' by coming forward with information that will help hunt out illegal cartels.<sup>5</sup> The campaign reached 21.3 million people, generating over 45 000 visits to the CMA's campaign's page and led to 108 tip offs to the CMA's cartels hotline. This continues the positive results from the first campaign, which helped drive a 30% increase in tip-offs in 2017.

<sup>1</sup> [www.gov.uk/government/news/cma-completes-probe-into-advertising-of-estate-agents-fees](http://www.gov.uk/government/news/cma-completes-probe-into-advertising-of-estate-agents-fees)

<sup>2</sup> [www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anti-competitive-arrangement-s](http://www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anti-competitive-arrangement-s)

<sup>3</sup> [www.gov.uk/cma-cases/residential-estate-agency-services-in-the-burnham-on-sea-area-director-disqualification](http://www.gov.uk/cma-cases/residential-estate-agency-services-in-the-burnham-on-sea-area-director-disqualification)

<sup>4</sup> [www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products](http://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products)

<sup>5</sup> [www.gov.uk/government/news/new-campaign-targets-cartels-as-tip-offs-rise-by-third](http://www.gov.uk/government/news/new-campaign-targets-cartels-as-tip-offs-rise-by-third)

A key focus of the OECD discussions on cartel related advocacy was vis-à-vis procurement officials and procurement authorities. Procurers are often best placed to detect signs of unlawful bidding arrangements and they have good knowledge of the respective industry sectors. In addition, they can design procurement tenders in a way that makes it harder for

suppliers to collude. The development of the discussions on procurement related advocacy is sketched out in the OECD roundtable on ex officio investigations (OECD, 2013<sup>[42]</sup>) (section 4.3). The Recommendation of the Council on Fighting Bid Rigging in Public Procurement [[OECD/LEGAL/0396](#)] expressly recommends that competition agencies should raise awareness of public procurement officials and provide training.

**Box 11.2. Recommendation of the Council on Fighting Bid Rigging in Public Procurement**  
[\[OECD/LEGAL/0396\]](#)

Excerpt from the Recommendation:

...

*II. RECOMMENDS that Members ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour and unusual bidding patterns which may indicate collusion, so that these suspicious activities are better identified and investigated by the responsible public agencies.*

*In particular, Members should encourage competition authorities to:*

- 1. Partner with procurement agencies to produce printed or electronic materials on fraud and collusion awareness indicators to distribute to any individual who will be handling and/or facilitating awards of public funds;*
- 2. Provide or offer support to procurement agencies to set up **training for procurement officials, auditors, and investigators at all levels of government** on techniques for identifying suspicious behaviour and unusual bidding patterns which may indicate collusion; and*
- 3. Establish a continuing relationship with procurement agencies such that, should preventive mechanisms fail to protect public funds from third-party collusion, those agencies will report the suspected collusion to competition authorities (in addition to any other competent authority) and have the confidence that competition authorities will help investigate and prosecute any potential anti-competitive conduct.*

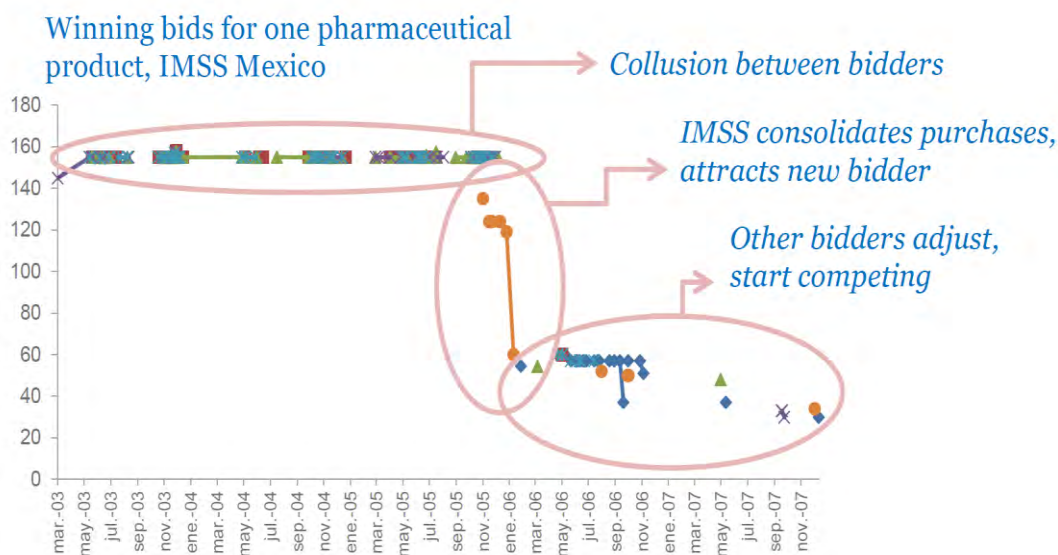
The 2016 monitoring report on the implementation of the Recommendation of the Council on Fighting Bid Rigging in Public Procurement (OECD, 2016<sup>[45]</sup>) concluded that “most Members and Partners of the Competition Committee have developed guidelines and awareness materials, like brochures and newsletters, addressed to procurement officials to help them design tenders so as to avoid bid rigging as well as be able to identify and flag possible signs of collusive behaviour.” In addition to developing materials, almost all competition authorities who responded to the 2015 survey on the implementation of the Recommendation reported that they carried out training activities (OECD, 2016<sup>[45]</sup>).

Competition assessment of existing or new laws or regulations is another important part of advocacy against cartels that is directed to the government and policy makers. Markets with oligopolistic market structures – small numbers of competitors, homogenous products, stable supply and demand and barriers to entry – can facilitate collusion (OECD, 2015<sup>[69]</sup>). Competition authority advocacy directed at government action, law or regulation that contributes to making markets less prone to collusion and opens markets to more competition can achieve considerable benefits.

One example of the results of this kind of advocacy is lowering barriers to entry to break cartels. This can happen for example when new or foreign bidders are admitted to public tender procedures (see Figure 11.1). Policies that set incentives for more competition in markets can

help to break up existing cartels and prevent new ones. The OECD’s Competition Assessment Toolkit (OECD, 2016<sup>[71]</sup>) and the OECD Recommendation of the Council on Competition Assessment [C(2009)130] (OECD, 2009<sup>[71]</sup>) mandate such pro-competitive changes and call on governments to associate competition bodies or officials with the assessment process.

**Figure 11.1. The Mexican Institute of Social Security– Opening Markets to New Bidders**



*Note:* This one policy change that was brought about by competition screening and subsequent advocacy to change procurement procedures and to open markets to new bidders saved IMSS about 2,500 million pesos annually (2014 data), or approximately USD 140 million: IMSS (2015) Informe al Ejecutivo Federal y al Congreso de la Unión Sobre La Situación Financiera y los Riesgos del Instituto Mexicano del Seguro Social 2014-2015 at [www.imss.gob.mx/conoce-al-imss/informe-2014-2015](http://www.imss.gob.mx/conoce-al-imss/informe-2014-2015)

*Source:* Adapted from Carlos Mena-Labarthe (2012), Mexican Experience in Screens for Bid-Rigging, Competition Policy, International Antitrust Chronicle, March 2012, at <http://www.competitionpolicyinternational.com/assets/Uploads/LabartheMAR-121.pdf>

The ICN has also issued guidance on competition assessment as one of the main advocacy tools for competition agencies (ICN, n.d.<sup>[73]</sup>).

More work was carried out by the ICN on competition and cartel related advocacy to non-government stakeholders. The two part Advocacy Toolkit published in 2011 (ICN, 2011<sup>[74]</sup>) aims at “providing an overview of the competition advocacy process and the range of tools available, in order to share and disseminate alternative approaches to advocacy across competition agencies and provide a useful, practical guide to competition agencies looking to amend or refresh their current approach.” (ICN, 2015, p. 4<sup>[75]</sup>).

More specific, cartel related guidance on advocacy was produced by the ICN Cartel Working Group, the Chapter on Cartel Awareness, Outreach and Compliance (ICN, 2012<sup>[76]</sup>). Cartel awareness refers to the general public’s knowledge or perception of anti-cartel laws and possible sanctions and can be enhanced by numerous communication efforts of competition agencies such as press conferences, the active use of electronic, print and broadcast media, or the organisation of competition events. Outreach refers to activities where the agency takes an active role and delivers targeted trainings or messages to pre-defined target groups. These target groups can be the legislators, other law enforcement or regulatory authorities, public procurement authorities, courts, consumers, business and trade organisations, and journalists and media. Another cartel related advocacy component identified is compliance, the efforts

businesses make to comply with competition law. An agency can use various approaches to foster competition law compliance. All cartel related advocacy measures taken together will increase competition law awareness and knowledge about the consequences of violating the law and will thus contribute to the overall competition culture of a jurisdiction, but also to increased detection and deterrence.

Competition agencies will need to select an appropriate balance between advocacy and enforcement activities with regard to cartels. Much will depend on the maturity of the enforcement system, the role and standing of the agency, the economic situation and history of a country, and the development stage of an economy. As a result, there is no standard approach to cartel related advocacy. Every agency will have to choose the appropriate mix that fits its specific circumstances. The above mentioned ICN Chapter on Cartel Awareness, Outreach and Compliance provides a number of case studies that illustrate various approaches different agencies have used.

Another prominent initiative to promote the exchange on advocacy strategies between competition agencies is the Competition Advocacy Contest that is held on an annual basis since 2014/5 by the World Bank and the ICN ([www.worldbank.org/en/events/2017/11/08/the-2017---2018-competition-advocacy-contest](http://www.worldbank.org/en/events/2017/11/08/the-2017---2018-competition-advocacy-contest)).

### Box 11.3. Selected Examples for Cartel Advocacy

#### Compliance – Educating businesses: Canada

Canada has launched a series of videos to help companies identify and prevent anti-competitive conduct.

Source: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_03700.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03700.html)



#### Early Education – Schools : Germany

Germany has issued a range of teaching materials to be used at schools and offers trainings for teachers as well as visits to the agency for school classes.

Source: [www.bundeskartellamt.de/DE/UeberUns/Schulmaterial/schulmaterial\\_node.html;jsessionid=6C31B5F3BFC3FBE7C0ACFE5FAEAE08F5C5.1\\_cid362#doc4801612bodyText1](http://www.bundeskartellamt.de/DE/UeberUns/Schulmaterial/schulmaterial_node.html;jsessionid=6C31B5F3BFC3FBE7C0ACFE5FAEAE08F5C5.1_cid362#doc4801612bodyText1)

#### Leniency – Going viral : Netherlands

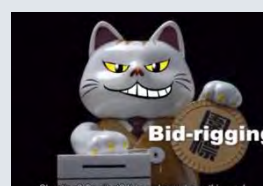
The ACM has launched a video clip in the course of its 2016 offensive against cartels. It was distributed on social media networks and went viral.

Source: <http://www.youtube.com/watch?v=6reTgnv2-SU>



**Awareness – New law: Hong Kong, China** The Competition Commission of Hong Kong, China, as used a series of videos to inform the public and businesses about the new competition law.

Source: [www.compcomm.hk/en/media/advertisements/tv\\_video.html](http://www.compcomm.hk/en/media/advertisements/tv_video.html)



## 11.2. Results of the 2017 Survey on advocacy

Sixteen jurisdictions out of 42 reported having conducted a survey on public awareness of the importance of enforcement against cartels addressed to the business community or the general public. More than half of respondents had some public awareness or outreach programme in

place. These programmes typically include seminars, public speeches, media releases, multimedia campaigns, workshops, use of online media, guides and trainings for public procurement officials, publications for universities, government officials, private sector associations and businesses, and educational programmes.

New Zealand has undertaken outreach projects in public procurement and in the health and construction industries, in order to build knowledge and increase the understanding of the law, especially in these areas that are particularly vulnerable to anti-competitive activity.

In the Netherlands, the ACM launched a large multimedia campaign against illegal cartel agreements in 2016 with the goal of increasing awareness of the negative effects of cartels, as well as encouraging possible informants to come forward. The ACM decided to target the port sector, due to its importance for the country's economy and its low current level of competition. The UK Competition and Markets Authority also launched a campaign targeting possible witnesses of illegal activities, such as businesses and individuals working in specific sectors. The result was indeed an increase in the number of contacts to the agency's cartels hotline.

Romania held a series of events at the local level, in partnership with other authorities, universities, chambers of commerce and consumers' organisations, aimed at the dissemination of academic research and best competition practices.

In 2013, Denmark launched an awareness campaign to inform individuals and undertakings about the sanctions for competition infringements, including the possibility of imprisonment, using among various means also television spots. This was followed in 2015 by an advocacy campaign, to encourage companies to take a stand against cartels.

### 11.3. Conclusions and steps forward

Cartel related advocacy can take on many different forms and target a multitude of stakeholders. Advocacy can help to create and maintain a competition culture, enhance awareness, promote pro-competitive changes in legislation or practice, and increase detection and deterrence of cartels.

Cartel related advocacy and vigorous enforcement against cartels are two sides of the same coin. One will benefit from the other. Advocacy without a credible enforcement threat will lack teeth, while enforcement will greatly benefit from accompanying advocacy measures to spread the word and to extend a deterrent effect beyond the cartels under investigation.

Competition agencies will need to find the right mix of advocacy and enforcement, and the right advocacy measures that fit their society and economy, their stage in the "life-cycle" of an agency and their resources. The OECD and the ICN have a wealth of examples and materials to inspire and guide mature as well as young agencies.

The Recommendation could be revised to encourage Adherents to support competition agencies in advocating for effective action against hard core cartels vis-à-vis private and public stakeholders, considering the mutually beneficial relationship between advocacy and enforcement efforts.



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## Annex A. Recommendation of the Council concerning effective action against hard core cartels

25 March 1998 - C(98)35/FINAL

**THE COUNCIL,**

**HAVING REGARD** to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

**HAVING REGARD** to previous Council Recommendations' recognition that "effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports" [C(86)65(Final)]; and that "anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion, and other economic goals of Member countries" [C(95)130/FINAL];

**HAVING REGARD** to the Council Recommendation that exemptions from competition laws should be no broader than necessary [C(79)155(Final)] and to the agreement in the Communiqué of the May 1997 meeting of the Council at Ministerial level to "work towards eliminating gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways" [C/MIN(97)10];

**HAVING REGARD** to the Council's long-standing position that closer co-operation is necessary to deal effectively with anticompetitive practices in one country that affect other countries and harm international trade, and its recommendation that when permitted by their laws and interests, Member countries should co-ordinate investigations of mutual concern and should comply with each other's requests to share information from their files and to obtain and share information obtained from third parties [C(95)130/FINAL];

**RECOGNISING** that benefits have resulted from the ability of competition authorities of some Member countries to share confidential investigatory information with a foreign competition authority in cases of mutual interest, pursuant to multilateral and bilateral treaties and agreements, and considering that most competition authorities are currently not authorised to share investigatory information with foreign competition authorities;

**RECOGNISING** also that co-operation through the sharing of confidential information presupposes satisfactory protection against improper disclosure or use of shared information and may require resolution of other issues, including potential difficulties relating to differences in the territorial scope of competition law and in the nature of sanctions for competition law violations;

**CONSIDERING** that hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others; and

**CONSIDERING** that effective action against hard core cartels is particularly important from an international perspective -- because their distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive -- and particularly dependent upon co-operation -- because they generally operate in secret, and relevant evidence may be located in many different countries;

**I. RECOMMENDS** as follows to Governments of Member countries:

### A. Convergence and Effectiveness of Laws Prohibiting Hard Core Cartels

1. Member countries should ensure that their competition laws effectively halt and deter hard core cartels. In particular, their laws should provide for:

- a) Effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and
- b) Enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.

2. For purposes of this Recommendation:

- a) A “hard core cartel” is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;
- b) The hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country’s own laws, or (iii) are authorised in accordance with those laws. However, all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. After the issuance of this Recommendation, Members should provide the Organisation annual notice of any new or extended exclusion or category of authorisation.

### B. International Co-operation and Comity in Enforcing Laws Prohibiting Hard Core Cartels

1. Member countries have a common interest in preventing hard core cartels and should co-operate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which co-operation might be improved by positive comity principles applicable to requests that another country remedy anticompetitive conduct that adversely affects both countries, and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries’ important interests.

2. Co-operation between or among Member countries in dealing with hard core cartels should take into account the following principles:

- a) The common interest in preventing hard core cartels generally warrants co-operation to the extent that such co-operation would be consistent with a requested country’s laws, regulations, and important interests;
- b) To the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, Member countries’ mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process;
- c) A Member country may decline to comply with a request for assistance, or limit or condition its co-operation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority’s resource constraints or the absence of a mutual interest in the investigation or proceeding in question;
- d) Member countries should agree to engage in consultations over issues relating to co-operation. In order to establish a framework for their co-operation in dealing with hard core cartels, Member countries are encouraged to consider entering into bilateral or multilateral agreements or other instruments consistent with these principles.



3. Member countries are encouraged to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

4. The co-operation contemplated by this Recommendation is without prejudice to any other co-operation that may occur in accordance with prior Recommendations of the Council, pursuant to any applicable bilateral or multilateral agreements to which Member countries may be parties, or otherwise.

**II. INSTRUCTS** the Competition Law and Policy Committee:

1. To maintain a record of such exclusions and authorisations as are notified to the Organisation pursuant to Paragraph I. A 2b);

2. To serve, at the request of the Member countries involved, as a forum for consultations on the application of the Recommendation; and

3. To review Member countries' experience in implementing this Recommendation and report to the Council within two years on any further action needed to improve co-operation in the enforcement of competition law prohibitions of hard core cartels.

**III. INVITES** non-member countries to associate themselves with this Recommendation and to implement it.



## Annex B. Questionnaire on developments in cartel enforcement regarding the Recommendation of the Council concerning effective action against hard core cartels

This questionnaire seeks information for the purposes of preparing the Competition Committee's report to the OECD Council on the implementation of the Recommendation concerning Effective Action against Hard Core Cartels (hereinafter the "Recommendation"), and developments concerning the fight against hard core cartels. The draft report will be discussed during Working Party No. 3's meeting on 20 June 2017.

Please send us your responses by 20<sup>th</sup> April 2017. If you are unable to reply to all questions because of confidentiality constraints or lack of information, please provide as much information as reasonably possible. To the extent information has been provided in your contribution(s) to OECD competition policy roundtables, or the 2013 OECD/ICN Survey on International Competition Enforcement Co-operation ([www.oecd.org/competition/oecd-icn-international-cooperation-survey.htm](http://www.oecd.org/competition/oecd-icn-international-cooperation-survey.htm), section on international co-operation), it can be incorporated in your response by reference.

Any question can be addressed to Satoshi Ogawa ([Satoshi.OGAWA@oecd.org](mailto:Satoshi.OGAWA@oecd.org)) and Despina Pachnou ([Despina.PACHNOU@oecd.org](mailto:Despina.PACHNOU@oecd.org)).

- Please specify your jurisdiction: [    ]
- Please provide the name of your authority: [    ]
- Please provide the name and email address of the contact person if the OECD has queries on your answers: [    ]

The Recommendation consists of four parts:

- the preamble, which gives the basis for the Recommendation
- the substantive recommendations (see below)
- the instructions, which stipulate that the Competition Committee should review and report to the Council on the implementation of the Recommendation; a list of the past three reports is annexed to this questionnaire [Annex 1]
- the association clause, which invites non-Members to adhere to the Recommendation.

The substantive recommendations are on enforcement and co-operation. The part entitled "*Convergence and Effectiveness of Laws Prohibiting Hard Core Cartels*" stipulates that the competition laws of Member countries should provide for effective sanctions to deter firms and individuals from participating in hard core cartels, as well as enforcement procedures to detect and remedy such cartels. It then provides the definition of 'hard core cartels' and states that any new or extended exclusions from such definition should be notified to the OECD Competition Committee.

The part entitled "*International Co-operation and Comity in Enforcing Laws Prohibiting Hard Core Cartels*" deals with international co-operation, exchange of information and investigative assistance.

- This survey focusses on these two main areas and includes questions on: Effectiveness of sanctions against hard core cartels

- Enforcement procedures to detect and investigate cartels
- International co-operation and mutual investigative assistance in hard core cartels cases.

**I. *Convergence and Effectiveness of Laws Prohibiting Hard Core Cartels***

**1. *Definition of “hard core cartels”***

- 1.1 Please provide the text of your law provisions that define hard core cartels and other horizontal anticompetitive agreements.
- 1.2 Have there been any issues derived from such definition in pursuing hard core cartels recently, especially in tackling new types of cartels and other horizontal anticompetitive agreements? YES/NO If yes, please specify.

**2. *Effective sanctions to deter companies and individuals from participating in hard core cartels***

- 2.1 Please describe your current legal framework for sanctions against companies and individuals for participating in hard core cartels, responding separately for each different type of enforcement (administrative, civil, or criminal), in one page at maximum.
- 2.2 In your jurisdiction, are there criminal sanctions against individuals involved in hard core cartels or categories of cartels (e.g., bid-rigging), under either competition laws or other laws? YES/NO. If yes, please specify.
- 2.3 In your jurisdiction, are there other sanctions against individuals involved in hard core cartels, such as disqualification from management positions, under either competition laws or other laws? YES/NO. If yes, please specify.
- 2.4 Please provide general information on your enforcement actions against hard core cartels, using the following table:

Year	Number of hard core cartel cases* in which your authority took enforcement action	Total amount of criminal monetary fines imposed on companies (in EURO: please use the exchange rate to your currency, as at 31 December of the relevant year)	Total amount of civil pecuniary penalties imposed on companies (in EURO: please use the exchange rate to your currency, as at 31 December of the relevant year)	Total amount of criminal monetary fines imposed on individuals (in EURO: please use the exchange rate to your currency, as at 31 December of the relevant year)	Total amount of civil pecuniary penalties imposed on individuals (in EURO: please use the exchange rate to your currency, as at 31 December of the relevant year)	Total number of individuals sentenced to jail for involvement in hard core cartels	Total number of cases where jail sentenced were imposed for involvement in hard core cartels	Total number of disqualifications from management positions for involvement in hard core cartels	Total number of debarments from government contracts for involvement in hard core cartels
2011									
2012									
2013									
2014									
2015									
2016									

\* For the purposes of this questionnaire, a case/ decision concerning the same cartel is considered to be one, even if there are different decisions for each cartel participant.

Do you consider the current legal framework for sanctions on companies and individuals to be adequate to deter cartels? Please answer to the following questions separately.

- Level of sanctions YES/NO If no, please provide reasons and your views.
- Types of sanctions YES/NO If no, please provide reasons and your views.

2.5 Please describe significant legislative, regulatory or practice developments concerning sanctions against companies or individuals, since 2005 or currently considered. Please provide the background/reasons for such developments.

### **3. *Private enforcement concerning hard core cartels***

3.1 Please describe your legal framework for private enforcement concerning hard core cartels, in one page at maximum. Please provide data that you have available on the level of private enforcement concerning hard core cartels since 2011, such as the number of actions and percentage of cartel cases in which private actions were filed relative to all cartel cases investigated by your authority.

3.2 In your jurisdiction, are class actions or other collective redress mechanisms available for private actions for damages caused by hard core cartels? YES/NO

3.3 In your jurisdiction, can plaintiffs in private actions for damages caused by hard core cartels seek for punitive damages (such as treble damages)? YES/NO

3.4 Please provide the number of subpoenas or requests from courts to provide information or opinions in private enforcement cases involving hard core cartels. Please specify the kind of information requested.

3.5 Does your authority have a policy on providing information or opinions in private enforcement actions? YES/NO. If yes, please specify.

3.6 Do you consider the current level of private enforcement against hard core cartels to be adequate? YES/NO. If no, please provide your reviews and suggestions for improvement.

3.7 Please describe significant legislative, regulatory or practice developments in private enforcement concerning hard core cartels, since 2005 or currently considered. Please provide the background/reasons for such developments.

### **4. *Enforcement procedures to detect and investigate cartels***

4.1 General question on enforcement procedures: Please describe your current legal framework on enforcement in hard core cartel cases, in one page at maximum.

4.2 Leniency/amnesty programmes:

4.2.1 Does your authority currently have a leniency/amnesty programme in place relating to hard core cartels? YES/NO. If yes, please provide a short description of your current programme, as well as data that you can share on the programme since 2011, including: the number of leniency applications made, the number of leniency applications granted and the percentage of cartel cases detected through leniency applications.

4.2.2 Please provide your assessment of the effectiveness of the leniency/amnesty programme in your jurisdiction in terms of detection of cartels and collection of evidence.

4.2.3 Are there any legal or practice challenges regarding the leniency/amnesty programme in your jurisdiction? YES/NO. If yes, please briefly describe them, as well as your suggestions for improvement.

#### 4.3 Settlements, plea bargaining and commitment procedures:

4.3.1 Does your jurisdiction have powers to use settlements, plea bargaining, commitment procedures, or other types of negotiated/consensual procedures for settling cartel cases? YES/NO If yes, please briefly describe such procedures.

4.3.2 If your jurisdiction has powers to use settlements, plea bargaining, commitment procedures or other types of negotiated/consensual procedures for settling cartel cases, please provide the following information:

Year	Total number of cartel cases in which settlement or plea bargaining were used against some or all defendants	Total number of cases in which commitment procedures were used against some or all cartel participants	Total number of other types of negotiated/consensual procedures for settling cartel cases against some or all defendants
2011			
2012			
2013			
2014			
2015			
2016			

4.3.3 Please provide your overall assessment on the benefits of the settlements, plea bargaining, commitment or other negotiated procedures (e.g., saving of resources, rapid resolution of cases), whether they have materialised in your jurisdiction, and if not, please identify the reasons for that.

4.3.4 Are there legal or practice challenges in the settlements, plea bargaining, commitment or other negotiated procedures for settling cartel cases in your jurisdiction? YES/NO If yes, please briefly describe them, as well as your suggestions for improvement.

#### 4.4 *Ex officio* investigations and proactive cartel detection methods:

4.4.1 Please describe the *ex officio* investigations and proactive cartel detection methods in your jurisdiction, using the following table. If multiple detection sources were used in the same cartel investigation, the case can be counted more than once, under each relevant column.

Year	Total number of cartel cases detected through complaints from third parties	Total number of cartel cases detected through screening of data (e.g., analysis of economic data or firm behaviour)	Total number of cartel cases detected through monitoring of publicly available information	Total number of cartel cases detected as a result of private damages/ class actions	Total number of cartel cases detected through other <i>ex officio</i> proactive methods: please specify which
2011					
2012					
2013					
2014					
2015					
2016					

4.4.2 Please provide a brief overview of your experience with *ex officio* / proactive cartel detection methods in your jurisdiction, in particular: the methods that have proven more successful (ranking them if possible), challenges and your suggestions for improvement.

#### 4.5 Powers to obtain documents and information:

4.5.1 Does your authority have the following powers for cartel investigations?

- Compulsory powers to require the production of documents/information YES/NO If yes, please specify.
- Powers to conduct search warrants or dawn raids YES/NO. If yes, please specify.

- Power to gather and capacity to analyse electronic evidence YES/NO If yes, please specify.
  - Power to obtain oral statements YES/NO If yes, please specify.
  - Wiretap authority YES/NO If yes, please specify.
  - Other investigative powers YES/NO If yes, please specify.
- 4.5.2 Please briefly describe the relative importance (e.g., frequency and usefulness) of such powers (4.5.1 (i) to (vi) above) for cartel investigations.
- 4.5.3 Is there any instance in which penalties for companies' non-compliance with or obstruction of your cartel investigations have been imposed since 2011? YES/NO. If yes, please specify.
- 4.6 Other developments on enforcement:
- 4.6.1 Are there any interesting cartel cases that have been prosecuted and could be good illustrative examples of your enforcement activity from 2011 to 2016? YES/NO. If yes, please describe such cases (e.g., domestic or cross-border, products/services concerned, geographic area affected, duration, estimates of affected commerce, and sanctions).
- 4.6.2 Please describe significant legislative, regulatory or practice developments concerning the enforcement against hard core cartels since 2005 or currently considered, which were not covered in the responses to the above questions. Please provide the background/ reasons for such developments.
- 5. *Notification of exclusions or authorisations from the defined cartels***
- 5.1 Please describe the direct or indirect exclusions from the coverage of your laws on hard core cartels, and authorisations of what would otherwise be hard core cartels, in your jurisdiction, as well as in which industry such exclusions and authorisations apply.
- 5.2 Has there been any change in such exclusions and authorisations since 2011? YES/NO. If yes, please specify.
- 5.3 Please provide your views on the need to maintain the provisions on notifications of such exclusions or authorisations in the Recommendation.
- 6. *Raising public awareness***
- 6.1 Has your authority conducted surveys on awareness (either of the business community or the general public) of competition law, the importance of prohibiting hard core cartels and their harm since 2011? YES/NO.
- 6.2 Does your authority publish the results of such surveys? YES/NO. If yes, please briefly summarise the results.
- 6.3 Please describe your public awareness and outreach programmes (if any).



## **II. *International Co-operation and Comity in Enforcing Laws Prohibiting Hard Core Cartels***

### **1. *General question on international co-operation***

1. Please describe any significant developments concerning international co-operation that have taken place after the 2013 OECD/ICN Survey on International Competition Enforcement Co-operation ([www.oecd.org/competition/oecd-icn-international-cooperation-survey.htm](http://www.oecd.org/competition/oecd-icn-international-cooperation-survey.htm)) or that are currently considered.
2. Are there any significant changes since the 2013 OECD/ICN Survey on International Competition Enforcement Co-operation to eliminate obstacles to, and enhance, international co-operation?

### **2. *Capacity and powers available to provide and obtain mutual investigative assistance***

1. Please describe legal powers available to your authority to provide investigative assistance to foreign competition authorities (e.g., exchange of (non-)confidential information, collection of information and use of compulsory powers and searches for, or on behalf of, foreign competition authorities). Please mention the relevant law provisions.
2. Do you maintain statistics or estimates relating to the provision or receipt of investigative assistance? YES/NO. If yes, how often has your competition authority provided or received investigative assistance since 2013? Please distinguish between formal and informal requests.
3. Please provide examples of the nature/ type of formal or informal investigative assistance your competition authority has provided or received since 2013. Non-specific examples may be provided.
4. Please describe any legal and practical barrier your competition authority has experienced in providing or receiving investigative assistance.
5. What capacity and resources does your competition authority have in practice to provide or obtain formal or informal investigative assistance, for example, in respect of logistical assistance, informal assistance, exercising information-gathering powers, providing documents, and so on.
6. Please describe any additional arrangements that your competition authority is currently working on that would lead to greater capacity to provide or receive investigative assistance or co-operation.
7. Are there cartel investigations in your jurisdiction which were adversely affected by the inability of your cartel investigators to obtain investigative assistance from outside your jurisdiction? YES/NO If yes, please describe the nature of the difficulties those investigations faced and whether provision of investigative assistance by foreign agencies might have enabled the investigations to be concluded.
8. Please describe any initiatives that you consider would be beneficial to developing the nature and extent of formal and informal investigative assistance or co-operation.
9. Do cartel investigators have less capacity in your jurisdiction to seek and provide mutual assistance to counterparts in foreign jurisdictions than other investigators of corporate misconduct such as financial sector and securities regulators? YES/NO If yes, please briefly describe the major differences, and what is the rationale for them.
10. Please provide your view on whether the capacity, and/or limitations, to provide and receive assistance in cartel investigations should be specifically covered by the Recommendation.

### **III. *Need to update the Recommendation***

Please provide your views on the need to update the Recommendation. If you think that the Recommendation should be revised, please identify the areas that you would change and the issues you think would be worth covering in a revised Recommendation.

### **IV. *Additional Remarks***

Please provide information or comments on this topic that are not covered above.

Thank you, we truly appreciate your contribution to this questionnaire.

## Annex to the Questionnaire

List of the past three reports to the Council

Reports: Hard Core Cartels: Third report on the implementation of the Recommendation (2005)  
[www.oecd.org/competition/cartels/35863307.pdf](http://www.oecd.org/competition/cartels/35863307.pdf)

Reports: Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programme (2002)  
<http://www.oecd.org/competition/cartels/1841891.pdf>

Reports: Hard Core Cartels (2000) <http://www.oecd.org/competition/cartels/2752129.pdf>



[www.oecd.org/competition](http://www.oecd.org/competition)

