The OECD Competition Committee and cartel enforcement

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Issues to be addressed

1) Cartels and hard core cartels

2) The harm from hard core cartels

3) The OECD Hard Core Cartels Recommendation and the subsequent OECD work on cartels

4) Detecting cartels: leniency

5)Sanctioning hard core cartels

6) Private enforcement

7) Plea bargaining

8) International cooperation

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2002 Report on the nature and impact of hard core cartels and sanctions against cartels under competition laws: The harm from cartels

Cartels that successfully reduce output and raise price above the competitive level cause consumers, collectively, to purchase less of the cartelised product and to pay more for the quantity that they do purchase.

In addition to the misallocation of resources, a cartel reduces pressure to control costs and to innovate. This harm to "productive" and "dynamic" efficiency is no less real than that to "allocative" efficiency, if even more difficult to measure.

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(1998)Recommendation concerning effective action against hard core cartels

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.

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The harm from cartels

(1998) Recommendation concerning effective action against hard core cartels: the harm from cartels

The CLP reports that in the United States alone, ten recently condemned international cartels:

• cost individuals and businesses many hundreds of millions of dollars annually;

• affected over $10 billion in US commerce, with overcharges of over $1 billion;

• caused even more harmful economic waste estimated at over $1 billion

2002 Report on the nature and impact of hard core cartels and sanctions against cartels under competition laws: The harm from hard core cartels

The worldwide economic harm from cartels is clearly very substantial, although it is difficult to quantify it accurately.

The OECD's Competition Committee survey of cartel cases conducted by its Members between 1996 and 2000, described a total of 119 cases. The amount of commerce affected by just 16 large cartel cases reported in the OECD survey exceeded USD 55 billion world-wide. The survey showed that the cartel mark-up can vary significantly across cases, but in some it can be very large, as much as 50% or more.

Thus, it is clear that the magnitude of harm from cartels is many billions of dollars annually.

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(1998) Recommendation concerning effective action against hard core cartels

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.

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The OECD work on cartels

1995 Council's Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade

1998 Council's Recommendation Concerning Effective Action Against Hard Core Cartels

2000 Hard Core Cartels Report

2001 Report on leniency programs to fight hard core cartels.

2002 Report on the nature and impact of hard core cartels and sanctions against cartels under competition laws

2006 Policy Roundtable on Plea Bargaining

2007 Policy Roundtable on Private Remedies

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Detecting cartels: Leniency

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2000 Report on leniency programs to fight hard-core cartels: definition

The term "leniency" describes all programs that provide for any reduction in sanction in exchange for information and co-operation.

"Amnesty" describes a program that promises no penalty to the first party to come forward to the enforcement agency and comply with the agency's requirements.

Amnesty is included within the more general concept of leniency.

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2000 Report on leniency programs to fight hard-core cartels

The challenge in attacking hard-core cartels is to penetrate their cloak of secrecy. To encourage a member of a cartel to confess and implicate its co-conspirators with first-hand, direct "insider" evidence about their clandestine meetings and communications, an enforcement agency may promise a smaller fine, shorter sentence, less restrictive order, or complete amnesty.

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2000 Report on leniency programs to fight hard-core cartels

The 1978 amnesty program for corporations in the US is revised in 1993. Similar program for individuals who approach the Antitrust Division on their own behalf to report antitrust violations was announced in 1994.

1990 adoption of an immunity program in Canada, which treats cartels as criminal offences. Revised in September 2000.

1996 The European Commission announces its leniency program (revised in 2002).

1997 adoption of the Korean leniency program, authorised in the competition law.

2000 adoption of leniency program in the UK new Competition Act.

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2000 Report on leniency programs to fight hard-core cartels : objections

An objection to leniency, similar to an objection sometimes raised against "plea bargaining", is that law enforcement agencies that take less than vigorous action against violations are improperly shirking their duties. In such a conception of jurisprudence, the enforcer has no discretion to moderate the law's application.
But some prioritising and balancing of costs and benefits in the enforcement process is inevitable. The European Commission addresses this objection directly, finding that "the interests of consumers and citizens in ensuring that [cartel] practices are detected and prohibited outweigh the interest in fining those enterprises which co-operate with the Commission, thereby enabling or helping it to detect and prohibit a cartel". A similar statement appears in the UK program.

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2000 Report on leniency programs to fight hard-core cartels : objections

There could be concern about the injustice of permitting a violator to avoid the consequences of its action by confessing and shifting the burden to others.

But for violations like cartels, where there will be several parties, considerations of enforcement effectiveness may outweigh that concern. That is, even though one party "gets off", there will be others to prosecute, and their prosecutions will be more certain and successful as a result of the evidence obtained through the amnesty offer.

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2000 Report on leniency programs to fight hard-core cartels : objections

Because the immediate effect of leniency is to reduce penalties to at least some participants, it has been argued that programs might actually encourage collusion, because they decrease the expected cost of misbehaviour (Motta, 1999).
But expected costs may be decreased only for the first firm in the door. For others, facing increased likelihood of detection and convincing proof of their participation, the expected costs of collusion may increase substantially after a leniency program is in place. At least, it is not clear that the net effect would be to make firms more, rather than less, willing to collude. A firm could not be too confident that it will be the first one in the door. Certainly, if it calculated that move too closely, it could trip itself, because good faith would be an element in the leniency decision.

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2000 Report on leniency programs to fight hard-core cartels: conditions for success

Clarity, certainty, and priority are critical, as firms may be more likely to come forward if the conditions and the likely benefits of doing so are clear. To maximise the incentive for defection and encourage cartels to break down more quickly, it is important not only that the first one to confess receive the "best deal", but also that the terms of the deal be as clear as possible at the outset.

The seriousness of the possible penalties, and thus the significance of the relief that leniency can promise, is an important factor. In addition, the risk of personal liability could be a powerful motivator.

Administering a leniency program requires procedures to verify the credibility of information offered and to ensure continued co-operation from firms and their officers and employees.

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2000 Report on leniency programs to fight hard-core cartels: fairness

Considerations of fairness may require refusing to grant leniency to a firm that was the cartel ringleader or that coerced other firms to enter it.

And similar considerations call for requiring the leniency applicant to make good faith efforts to terminate and correct the violation, including making restitution to victims.

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2000 Report on leniency programs to fight hard-core cartels: confidentiality

Confidentiality is important to leniency applicants, because informants can run serious risk of retaliation, as well as liability in other jurisdictions. Agencies with leniency programs promise strong protections against unauthorised disclosure.

Co-operating with other enforcement agencies about cartel enforcement will require finding ways to communicate about the existence of situations calling for enforcement attention, without divulging the details of these confidential sources.

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Sanctioning hard core cartels

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2002 Report on the nature and impact of hard core cartels and sanctions against cartels under competition laws: The purpose of sanctions

The principal purpose of sanctions in cartel cases is deterrence. Ideally, sanctions should take away the prospect of gain from cartel activity. Because not all cartels are uncovered and punished, many experts contend that effective deterrence requires imposing a fine against organisations participating in a cartel that is a multiple of the estimated gain on those cartels that are uncovered. Further, sanctions against individuals can provide important, additional deterrence.

The competition laws of most countries provide for the imposition of large fines against organisations for cartel conduct. In some cases, however, the maximum fines found in these laws may not be sufficiently large to accommodate multiples of the gain to the cartel, as recommended by many experts.

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Private enforcement

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(2007) Private remedies: goals and risks

Private antitrust enforcement can substantially improve the functioning of a competition regime. But more private enforcement is not always beneficial. Getting the "dosage" right must be a key objective of reforms, in order to avoid litigation that is wasteful and could discourage socially beneficial conduct.

It is a widely held view that private antitrust enforcement, like public enforcement, should in the first place aim to increase deterrence and compliance with competition laws.

Another view holds that private enforcement should focus primarily on the compensation of victims and when deterrence was insufficient, fines in public enforcement should be increased.

There was nevertheless agreement that differences between these two policy goals can be overstated and that they were not mutually exclusive.

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(2007) Private remedies: avoiding strategic litigations

Substantive competition law rules and procedural rules are interdependent. When creating procedures to encourage more private enforcement, the relationship between enforcement rules and substantive norms should be carefully considered. Private enforcement would work best if substantive rules are clear and well defined.

Many thought that private enforcement was much more problematic in single firm conduct cases because the distinction between pro-competitive conduct and competitive restraints was much more difficult to draw; substantive rules of liability were less clear; there was a much greater risk of strategic litigation, in particular litigation by competitors; and concerns existed about over-deterrence that would discourage innovative, pro competitive conduct. This could be an area where a competition authority's greater or perhaps exclusive role in developing antitrust doctrine was more desirable.

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(2007) Private remedies: public and private enforcement

Competition policy and competition law enforcement, including private enforcement, should be viewed as an integrated policy system in which a number of factors contribute to the goals of deterrence and compensation.

As private antitrust litigation increases, competition authorities no longer have a monopoly over the development of competition law and economics. Courts can contribute to the development of better substantive rules; but there is also a risk that the outcomes of private cases will deviate from what is generally accepted as sound competition policy. Institutional measures can be taken to achieve greater consistency between public and private enforcement. (development of clear substantive norms by competition authorities; their participation in private litigation as amicus curiae; procedural rules that either allowed or obliged courts to seek the opinion of the competition authority).

(2007) Private remedies: role of economic expertise

The growing importance of competition economics across all jurisdictions increases the role of economic experts in private litigation, whether they serve as court appointed experts or experts for the parties. Rules that encourage economic experts retained by the opposing parties to meet early in the process and identify items on which they agree can help the court to better manage a trial.

(2007) Private remedies: discovery

As plaintiffs in private actions for damages frequently will have insufficient evidence to support their claims, rules that facilitate their access to evidence in the defendant's possession can be an important component of a well-functioning private enforcement system. However, rules allowing for discovery must be carefully designed to avoid excessive costs and abusive litigation strategies. In addition, active case management by courts appears critical to limit the risk that parties abuse the discovery process.

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(2007) Private remedies: standing ?

As violations of competition laws may harm different groups of market participants, including direct and indirect customers, a private enforcement regime must decide which groups should be allowed to bring actions for damages.

No consensus exists on the most appropriate rules on standing. There is also very little empirical evidence available that could illuminate the debate.

If an enforcement regime allows indirect purchasers to sue for damages, rules should be in place to coordinate multiple law suits; in addition, indirect purchaser suits typically will be meaningful only if rules exist that make it possible to aggregate a large number of individual claims.

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(2007) Private remedies: sanctions

Public enforcement and private enforcement should jointly contribute to an adequate multiplier which may not be assured by either public enforcement or private enforcement alone. Thus, the fact that public fines already have been imposed on defendants cannot eliminate the need for private actions for damages to ensure optimal levels of deterrence. Available evidence suggests that even public fines and private damage awards combined regularly do not reach a level at which they would be considered an optimal deterrent.

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(2007) Private remedies: class actions

Class actions, collective actions, or other forms of actions that allow the aggregation of a large number of small claims for damages can be an important element in a competition regime that seeks to effectively deter anticompetitive conduct.

They can be a useful form of deterrence in particular with respect to hard core cartels.

Specific measures can be considered to ensure that such a system is successful and effective, such as proper incentives for counsel to litigate on behalf of a large class of plaintiffs as well as a series of measures ensuring that the interests of the class members are protected, such as active court supervision, rules against frivolous suits, and procedures to assure fairness to the class when damage awards are distributed.

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(2007) Private remedies: Use of public of information

Competition authorities can facilitate private actions by making evidence in their possession available to courts for use in private litigation. However, any assistance to courts and private plaintiffs must be carefully weighed against the risk that the sharing of evidence could interfere with the competition authority's investigation. Because of these concerns, some competition authorities will as a matter of policy resist all attempts by private plaintiffs to obtain documents from them.

In particular concern about the interaction between private actions and leniency programs. Policies to minimize the risk of undermining incentives to apply for leniency include limiting a leniency applicant's liability in private actions. But this also reduces the deterrent effects of private enforcement. There is no consensus about how to best resolve this trade-off.

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Plea Bargaining: protecting confidential information

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Plea Bargaining 2006

Plea agreements or negotiated settlements can be an efficient way to formally dispose of cartel cases. They can provide substantial benefits to competition authorities by allowing them to allocate their resources more efficiently and to increase enforcement activities, thus achieving greater deterrence. Plea agreements have substantial benefits for defendants as well.

Negotiated settlements will work best if a competition authority establishes a reputation of being consistent and fair in settlement negotiations, and both sides understand that they must act in good faith. Procedures governing settlements should be transparent and predictable, while also allowing for certain flexibility as the value of a party's cooperation can vary from case to case. They should also provide certainty.

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Plea Bargaining 2006: risks

Ideally, the sanctions in settlements should reflect only the saved costs of a trial or of adopting a formal decision plus the likelihood that a court might overturn a decision or lower fines on appeal.

Overall deterrence could increase if settlements free up a competition authority's resources and more cartels are detected and prosecuted. There is, however, a risk that negotiated settlements primarily become a mechanism to clear an agency's docket and get rid of "difficult" cases in which case overall deterrence might be reduced.

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Plea Bargaining 2006: risks

As long as a competition authority obtains substantial sanctions in negotiated settlements, there should be no negative effects on incentives to apply for immunity.

Competition authorities have different views about the relationship between negotiated settlements and leniency policies or similar policies that reward cooperation by cartel participants that did not receive immunity.

Jurisdictions with experience in negotiated settlements view the two as integrated policies.

On the other hand, some authorities are concerned that negotiated settlements could undermine incentives to cooperate under their leniency programs

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Plea Bargaining 2006: risks

Concerns that plea agreements could undermine the rights of defence and subvert the system of justice and fairness, frequently raised in the context of "ordinary" criminal cases, appear less justified with respect to negotiated settlements of cartel cases.

A jurisdiction's view of the role and nature of rights of defence will affect the scope of negotiated settlements. If a jurisdiction considers rights of defence as individual entitlements that defendants can trade and exercise by waiving them, the rights can be integrated into a settlement. In other jurisdictions, defendants might not be able to trade certain rights and therefore a waiver of these rights cannot be part of a plea agreement. This question will be most relevant with respect to the right of appeal.

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Plea Bargaining 2006: role of courts

Negotiated settlements in cartel cases raise a number of questions about the proper role of courts, including how actively courts should review a proposed settlement without unnecessarily interfering with settlement negotiations; in particular in administrative procedures there is a question whether defendants should be able to waive their right of appeal as part of a negotiated settlement.

This question must be answered in each jurisdiction in accordance with applicable constitutional laws.

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Plea bargaining 2006: public and private enforcement

Negotiated settlements can affect follow-on private litigation for damages. When negotiating settlements, a competition authority should seek to maximize overall deterrence from public and private enforcement.

A defendant might agree to a relatively higher fine in exchange for a settlement without admission of guilt or covering a shorter charge period, as both would reduce its exposure to private damages. Ideally, competition authorities should seek settlements that maximize overall deterrence resulting from public and private enforcement, rather than focus exclusively on the sanction they can obtain.

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International cooperation

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(2005) Best practices for the formal exchange of information between competition authorities in hard core cartel investigations

The 1998 Council's Recommendation Concerning Effective Action Against Hard Core Cartels recognised 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, 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.

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(2005) Best practices for the formal exchange of information between competition authorities in hard core cartel investigations

Situations where for the purposes of the investigation of hard core cartels under the competition laws of the requesting jurisdiction a competition authority in one jurisdiction provides information obtained from private sources to a competition authority in another jurisdiction; (ii) the competition authority would normally, under domestic law, be prohibited from disclosing such information to other competition authorities; and (iii) the disclosure of such information can occur only because it is authorised in certain circumstances by an international agreement or domestic law.

International agreements and domestic laws authorising such disclosure, should provide for the safeguards identified in these Best Practices.

Safeguards for Formal Exchanges of Information

Before making a formal request for information, the requesting jurisdiction should seek to consult with the requested jurisdiction to understand the circumstances under which the requested jurisdiction can act upon the request. It should provide sufficient information as is necessary for the requested jurisdiction to act upon the request.

The requested jurisdiction should have discretion to provide or not the information (if the investigation relates to conduct that would not be deemed hard core cartel conduct by the requested jurisdiction; if honouring the request would be unduly burdensome for the requested jurisdiction or might undermine an ongoing investigation; if the confidential information may not be sufficiently safeguarded in the requesting jurisdiction; if the execution of the request would not be authorised by the domestic law of the requested jurisdiction; or on public interest grounds of the requested jurisdiction)

Provisions Concerning Confidentiality, Use, and Disclosure in the Requesting Jurisdiction

1.The requesting jurisdiction should identify its domestic confidentiality laws and related practices.

2. The exchanged information should be used or disclosed by the requesting jurisdiction solely for purposes of the investigation of a hard core cartel under the requesting jurisdiction's competition laws in connection with the matter specified in the request and solely by the enforcement authorities in the requesting jurisdiction, unless the laws of the requested jurisdiction provide the power to approve the use or disclosure of the exchanged information in other matters related to public law enforcement.

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Provisions Concerning Confidentiality, Use, and Disclosure in the Requesting Jurisdiction

3. The requesting jurisdiction should confirm that it will to the fullest extent possible consistent with its laws: (i) maintain the confidentiality of the exchanged information; and (ii) oppose the disclosure of information to third parties for the use of such information in private civil litigation, unless it has informed the requested jurisdiction about such third party request for disclosure of the information, and the requested jurisdiction has confirmed that it does not object to the disclosure.

4. The requesting jurisdiction should ensure that its privilege against self incrimination is respected when using the exchanged information in criminal proceedings against individuals.

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Provisions Concerning Confidentiality, Use, and Disclosure in the Requesting Jurisdiction

5. The requesting jurisdiction should take all necessary measures to ensure that an unauthorised disclosure of exchanged information does not occur. In addition, it should make information available about the consequences under its domestic law in the event of such unauthorised disclosure. If, under exceptional circumstances, an unauthorised disclosure of exchanged information occurs, the requesting jurisdiction should take steps to minimise any harm resulting from the unauthorised disclosure, including promptly notifying the requested jurisdiction, and to ensure that such unauthorised disclosure does not recur. The requested jurisdiction should consider whether it is appropriate to notify the source of the information about the unauthorised disclosure.

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Protection of Legal Profession Privilege

1. The requested jurisdiction should apply its own rules governing information subject to and protected by the legal profession privilege when obtaining the requested information.

2. The requesting jurisdiction should, to the fullest extent possible, (i) formulate its request in terms that do not call for information that would be protected by the legal profession privilege under its law; and (ii) ensure that no use will be made of any information provided by the requested jurisdiction that is subject to legal profession privilege protections of the requesting jurisdiction.

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Notice to Source of the Exchanged Information

If an information exchange is made consistent with these Best Practices, the requested jurisdiction should not give prior notice of the exchange to the source of the information, unless such notice is required under its domestic laws or an international agreement.

If the requested jurisdiction provides notice to the source of the information of the fact that information has been exchanged, it should do so only if such notice does not violate a court order, domestic law, or an obligation under a treaty or other international agreement, or jeopardise the integrity of an investigation in either the requesting or requested jurisdiction.

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Transparency

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To the extent possible without compromising legitimate enforcement objectives, jurisdictions should ensure that their relevant laws and regulations concerning information exchanges covered by these Best Practices are publicly available

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Thank you for your attention

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