International Competition Network

Defining Hard Core Cartel Conduct
Effective Institutions
Effective Penalties

Building Blocks for Effective Anti-Cartel Regimes vol. 1

Report prepared by the
ICN Working Group on Cartels

ICN 4th Annual Conference
Bonn, Germany
6 - 8 June 2005

INTERNATIONAL
COMPETITION
NETWORK

www.internationalcompetitionnetwork.org

Defining Hard Core Cartel Conduct
Effective Institutions
Effective Penalties

BUILDING BLOCKS FOR
EFFECTIVE ANTI-CARTEL REGIMES
vol. 1

Report prepared by the
ICN Working Group on Cartels

ICN 4th Annual Conference
Bonn, Germany
6 - 8 June 2005

INTERNATIONAL
COMPETITION
NETWORK

www.internationalcompetitionnetwork.org

Report prepared
for the International Competition Network

Europe Direct is a service to help you find answers
to your questions about the European Union

Freephone number:

00 800 6 7 8 9 10 11

A great deal of additional information on the European Union is available on the Internet.
It can be accessed through the Europa server (http://europa.eu.int).

Cataloguing data can be found at the end of this publication.

Luxembourg: Office for Official Publications of the European Communities, 2005

ISBN 92-894-6737-1

© European Communities, 2005
Reproduction is authorised provided the source is acknowledged.

Printed in Luxembourg

PRINTED ON WHITE CHLORINE-FREE PAPER

TABLE OF CONTENT

EXECUTIVE SUMMARY 1

INTRODUCTION 5

PART I: DEFINING HARD CORE CARTEL CONDUCT 7

1. Unanimous Basic Concepts of a "Cartel" 9
   a) Common Elements in Statutory Language 9
   b) Commonality in Informal Definitions 10

2. 1998 OECD Definition 11

3. Complicating Issues in Anti-Cartel Laws 13
   a) General v. Specific Law 13
   b) Exemptions 13
   c) Inclusion of Vertical Conduct 14
   d) Standard of Analysis 14

4. Conclusions 15

5. Hard Core Cartel Bibliography 16

PART II: EFFECTIVE INSTITUTIONS 21

1. The Institutional and Legal Framework 24
   a) Institutional Embedding 24
   b) Criminalisation 26

2. The Basic Framework of Agencies' Anti-Cartel Organisation 30
   a) Sectoral vs. Dedicated Cartel Units 30
   b) Separating or Integrating Investigation and Prosecution 34
   c) Cooperation with other Bodies 38

3. Specific Organisational Requirements for an Effective Fight against Cartels 41
   a) Mastering a Leniency Programme 41
   b) Evidence Gathering, esp. Searches and "Raids" 42
   c) IT Forensics 43
   d) Witness Statement Taking / Interview Techniques 46

4. Conclusions 47

PART III: EFFECTIVE PENALTIES 49

1. The Notion of “Effective Penalties” 51
   a) Deterrence as a Primary Objective 52
   b) The Ideal Way to Calculate an Effective Deterrent 53
2. Penalties under Existing Competition Laws 55
   a) Punishable Cartels 55
   b) Fining Compavies 58
   c) Bankrupting Companies? 63
   d) Personal Responsibility: Fining Entrepreneurs and Managers 64
   e) Sending Decision-Makers to Jail? 66
   f) Further Penalties 67
3. Improving Effectiveness 68
   a) National Studies on Effective Penalties 68
   b) Self-Assessment of the Competition Agencies 69
4. Conclusions 74

EXECUTIVE SUMMARY

Cartels are generally considered among the most serious competition infringements. Competition authorities around the world are increasing their efforts to pursue cartel offences, both domestically and internationally.

The harmful effects of hard core cartels are well understood. Consumers benefit from competition through lower prices and better products and services. When competitors agree to forego competition for collusion, consumers lose those benefits. The competitive process only works when competitors set prices independently. Secret cartel agreements are a direct assault on the principles of competition and are universally recognised as the most harmful of all types of anticompetitive conduct.

However, the fight against cartels is a legally and practically demanding task. First of all, cartelists are by definition secretive about their illicit behaviour, and therefore agencies have to undertake great efforts to detect concealed cartels. Secondly, agencies need extraordinary powers and skills to collect sufficient evidence to mount a viable case against sometimes uncooperative defendants. Thirdly, only in the cartel area do agencies operate sophisticated leniency programmes to destabilise such conspiracies. Fourthly, the investigation of international cartels tests the limits of agencies' jurisdictional reach. Last but not least, the growing trend to criminalise cartel behaviour obliges many agencies to work to a particularly high standard of procedure and proof.

In line with the ICN's mission to serve as a platform to share antitrust expertise among its member agencies, this report sets out some of the experiences of agencies with a substantial level of anti-cartel enforcement. It is therefore intended to be useful for agencies which are currently contemplating upgrading their anti-cartel programmes. In this vein, this report offers a first batch of three 'building blocks' which are the bedrock of any solid anti-cartel regime, namely:

- a clear understanding – and prohibition – of conduct that constitutes a cartel;
- an institution well-equipped to detect, investigate and sometimes prosecute cartels (note that a special report on searches and raids is presented in parallel with this report);
- an effective sanctioning regime.

For the future, it is envisaged to complement this report with other 'building blocks' in due course.

Defining Hard Core Cartel Conduct

A first building block in the fight against cartels[1] is the clear identification of prohibited behaviour - conduct that is considered hard core cartel conduct. A clear delineation of such conduct provides guidance to the business community subject to the law and distinguishes hard core cartel behaviour for the purposes of punishment and deterrence as compared to less pernicious violations.

[1] As explained in Part I, the word "cartel" is used interchangeably in this report with the term "hard core cartel."

The recent increased cooperation among antitrust agencies in anti-cartel enforcement has enabled significant international convergence on cartel policy issues. Given the shared commitment to fighting cartels, Subgroup 1 explored the starting point for anti-cartel enforcement in various jurisdictions - the definition of a hard core cartel. The basic concepts of a cartel found in statutes and policy statements are nearly universal; a cartel is defined as an agreement between competitors to restrict competition. Further, the categories of conduct most often defined as "hard core" are also consistent: they are price fixing, output restrictions, market allocation, and bid rigging. While the basic understanding of what constitutes a cartel and the harmful effects of cartels is remarkably consistent across jurisdictions, there are several complicating issues that give rise to different approaches in defining and enforcing a cartel prohibition. These challenges include the questions of whether to enumerate specific prohibited conduct, the extent of exemptions to the law, whether to include vertical conduct, and the standard of proof required to establish a violation. These differences, however, have not obscured the consensus that combating cartels should be among the top priorities of any competition law enforcement agency.

Effective Institutions

A second building block relates to the organisational arrangements that agencies can make internally in order to be well set up for the fight against cartels.

An increasing number of competition agencies have set up special cartel branches. The motivation to do so was to build up centres of excellence with respect to the expertise and skills relevant to the organisation of investigations, in particular searches and raids, and the operation of leniency programmes. Increasingly, agencies' armouries of investigatory measures also encompass such advanced powers as IT-forensics, the interviewing of witnesses, and in some instances even covert surveillance. Agencies need specialists to operate such instruments successfully. It seems fair to say that this drive towards specialisation is particularly prominent among those agencies which have to bring criminal charges against cartel conspiracies. On the whole, agencies' experiences with these dedicated cartel branches seem to have been very positive.

Yet there are exceptions. Some agencies argue that an intimate knowledge of the sectors under investigation is likely to substantially increase the likelihood of detecting a cartel, and the quality of the investigation. For these reasons, those agencies have essentially organised themselves along sectoral rather than instrumental (cartels, mergers, ...) lines. However, mindful of the specific requirements of the fight against cartels, some of these agencies have supplemented their sectoral structure with smaller cartel support units.

Other issues on which the practices of jurisdictions differ relate to the right balance between, on the one hand, allowing the agency to fulfil its enforcement mission effectively and, on the other, respecting principles of due process and impartiality. This is clearly borne out by the different views as to whether it is desirable to leave the investigative stage of a cartel case in the same hands as the subsequent prosecutorial stage. The responses received demonstrate that there are various ways of appropriately striking this balance.

One of the most striking findings of our survey was the variety of ways in which agencies rely on outside assistance in their fight against cartels. Many agencies try to rely on internal resources to carry out all tasks, including the provision of IT-services. One has to recognise, however, that especially for smaller agencies the unavoidable peaks and troughs of cartel investigations can make an advanced level of specialisation difficult. Hard choices about priorities will have to be made.

Some agencies have responded to these challenges by outsourcing some of the tasks associated with cartel investigations. The possible scope for outsourcing ranges from asking police detectives to carry out searches, to relying on private contractors for the provision of expert IT skills. Integrating external staff into complex and sophisticated cartel investigations does not only raise issues of efficiency. In such circumstances issues of confidentiality and of potential conflicts of interest merit particular attention.

Effective Penalties

A third building block of an anti-cartel regime consists of the penalties available and applied for cartel conduct.

There is wide agreement that an effective penalty needs to be deterrent. An effective deterrent, in turn, is one that promises, on average, to take away at the minimum the financial gains that otherwise accrue to the cartel members.

In the case of fines against enterprises this would mean that both the expected gains from the cartel and the probability of detection have to be taken into account. Unfortunately, this theoretically ideal way of setting a deterrent fine is somewhat difficult to apply in practice, since it is not easy to assess and prove the benefits derived from cartel activities and almost impossible to determine the probability of detection. Thus, there seems to be no secret recipe for an effective penalty.

However, when looking at the penalties available under existing competition laws, one cannot help but notice a wide variety of ingredients to choose from. A survey of the agencies' current possibilities for sanctioning cartels reveals the diversity of methods used and the wide range of options available: All of the national systems examined allow for financial sanctions against companies and almost three quarters provide for fines against individuals. 42% of the countries surveyed even allow for prison sentences. Interestingly, the use made of these sanctions differs widely, one third of the survey's participants not reporting any cartel case at all within the three years' period examined. Prison sentences, for example, were issued only by a quarter of the jurisdictions having the possibility of doing so.

In any case it is noteworthy that the relatively small portion of agencies having imposed both the major part of penalties and the on average highest sanctions are most satisfied with their penalties regimes. These findings suggest that maybe in some cases it is not necessary for a jurisdiction to legislate to increase its maximum sanctions, in order to increase effectiveness, but for agencies to sanction up to the maximum.

In assessing the effectiveness of these types of sanctions, the possibility of imposing high fines is regarded as a matter of importance by many, even though the methods chosen to

determine the appropriate amount of a penalty still vary. Furthermore, the significance of the personal liability of the decision-makers is stressed. Some agencies also emphasise the effectiveness of criminal sanctions as a deterrent.

However, all of these instruments have their little inconveniencies. Imposing too high a fine on a company might have the undesired effect of bankrupting it and thus harming competition even further. When it comes to fining individuals, it is admittedly difficult to prevent their reimbursement by the companies they work for. Prison sentences might constitute very effective deterrents but their imposition implies very high procedural and substantial standards and guarantees.

In addition to these traditional penalties, attention is drawn to additional ways of achieving deterrence. An important example is the obligation to publish the sanctioning decision, since the harm done to the good name of a company might act as a very strong deterrent. Companies guilty of bid rigging might be excluded from public procurement procedures for a while. Company directors might be disqualified from exercising their functions for a given period of time. Even penalties such as restitution orders, community service, orders not to leave the country and supervision, might be applied.

INTRODUCTION

A truly global effort against hard core cartels has emerged in the past decade. Many jurisdictions have enacted new anti-cartel prohibitions or strengthened existing enforcement programmes; there has been an expansion of leniency programmes; and enforcement cooperation between agencies has dramatically increased. Today, cartels are generally recognised as the top priority for antitrust enforcers. For the ICN as the network of competition agencies, it was thus only a matter of time before it would reflect this priority on its international agenda.

This worldwide consensus is based on the recognition that hard core cartels harm consumers and damage economies. The harmful effects of hard core cartels are well understood. Consumers benefit from competition through lower prices and better products and services. When competitors agree to forego competition for collusion, consumers lose these benefits. The competitive process only works when competitors set prices independently. Secret cartel agreements are a direct assault on the principles of competition and are universally recognised as the most harmful of all types of anticompetitive conduct. Any debate as to whether cartel conduct should be prohibited has been resolved, as the prohibition against cartels is now an almost universal component of competition laws. In the seminal statement of international consensus on the topic, the 1998 OECD Recommendation proclaimed that cartels are *"the most egregious violations of competition law."*[2]

To be successful in detecting, investigating and prosecuting cartels, competition agencies have to rely on instruments and skills which are not commonplace in other anti-trust work. As the 2002 OECD report *Fighting Hard-Core Cartels* notes, because cartel behaviour is illegal, and even criminal in many jurisdictions, the participants take pains to conceal it. That secrecy makes discovering and proving violations much more difficult for enforcement agencies.

To help spreading and building up expertise in anti-cartel enforcement, ICN member agencies asked the European Commission and the Hungarian Competition Authority at the ICN's 3rd Annual Conference in Seoul to lead a new ICN Cartel Working Group. This project pursues a two-pronged strategy.

On the one hand, the ICN Cartel Working Group studies the practical enforcement techniques which are so vital to successful cartel investigations. To this end, we organise the annual ICN Cartel Workshop and specialist events like the workshops on leniency (November 2004) and IT Forensics (November 2005), and are drafting an Anti-Cartel Enforcement Manual. The first two chapters of that manual, on searches and raids and on leniency, are presented in parallel with this report.

On the other hand, the ICN Cartel Working Group recognised that the pursuit of cartels, and especially international cartels, also raises a number of more general questions of law and policy. Every jurisdiction wishing to be successful in anti-cartel enforcement has to consider these issues carefully. It is hoped that a discussion of these issues will in particular provide

[2] OECD Council, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* (1998).

younger agencies with the essential “building blocks” on which an effective anti-cartel regime can be mounted.

The Working Group intends to review these issues, or “building blocks”, progressively over the next few years. As a first step in this direction, the three chapters of this report summarise our findings on three building blocks which make up the bedrock of anti-cartel policy.

The first chapter analyses to what extent there is already a consensus about the right definition of the term “hard core cartel”. This chapter, drawn up under the leadership of the United States Department of Justice and the United Kingdom Office of Fair Trading, also offers useful references for further study.

The second chapter discusses another basic building block, namely agencies’ views on the most appropriate organisational setup to be effective in detecting, investigating, prosecuting and sanctioning cartels. As many agencies are currently reviewing their internal institutional arrangements in the cartel field, we hope that this discussion, for which the Competition Directorate-General of the European Commission assumed a special responsibility, will inform that on-going reflection process.

For the third chapter, member agencies were canvassed about their views on effective penalties. This chapter, which was jointly drafted by the German *Bundeskartellamt* and Brazil’s Ministry of Justice, first of all sets out the various types of penalties used in ICN member jurisdictions. It then goes on to discuss various factors which influence the appropriate level of a penalty.

As a basis for the discussion of these three chapters, the Cartel Working Group addressed, for each chapter, a survey instrument to a selection of agencies considered sufficiently representative in both geographic and institutional terms. The agencies selected were invited to state their approaches to the issues raised. Subsequently, a number of targeted follow-up questions were directed to several agencies in order to clarify and deepen the understanding of country-specific issues.

The Cartel Working Group wishes to express its gratitude to the many colleagues who have contributed generously and in many ways to the preparation of this report. First and foremost, this gratitude is owed to the cartel specialists in the competition agencies of Australia, Brazil, Canada, Chile, the European Union, France, Germany, Hungary, Ireland, Israel, Japan, Korea, Mexico, New Zealand, Pakistan, Russia, Slovakia, South Africa, Spain, Switzerland, Turkey, the United Kingdom, the United States and Venezuela, who made their time and expertise available by answering one or several of the survey instruments addressed to them.

Part
Defining Hard Core Cartel Conduct

PART I: DEFINING HARD CORE CARTEL CONDUCT

The world's antitrust agencies are united in agreement that hard core cartels have pernicious effects and should be a top enforcement priority.[3] However, it is worth asking whether agencies have agreed on what conduct constitutes a "hard core cartel."

The delineation of what constitutes hard core cartel conduct is useful in order to set enforcement priorities and standards, to provide clear guidance to companies and executives, and to set appropriate punishment for various antitrust violations. The General Framework subgroup of the Cartel Working Group received eighteen statements from members in the following jurisdictions addressing the definition of hard core cartels in their jurisdictions: Australia, Brazil, Canada, the European Union, Germany, Hungary, Ireland, Japan, Korea, Mexico, New Zealand, Russia, South Africa, Spain, Switzerland, the United Kingdom, the United States, and Venezuela. This paper describes the extent of common understanding that has developed around the term "hard core cartel" and examines the complicating factors in drafting, implementing, and enforcing competition laws prohibiting cartels.[4] In addition, a bibliography of sources discussing the definition of, and harm resulting from, hard core cartels is provided.[5]

1. Unanimous Basic Concepts of a "Cartel"

a) *Common Elements in Statutory Language*

In a clear and concise statement of what a cartel is, the United Kingdom's Office of Fair Trading website explains:

> *In its simplest terms, a cartel is an agreement between businesses not to compete with each other.*

[3] *"Cartels are a particularly damaging form of anti-competitive behavior – taking action against them is one of the OFT's priorities."* Office of Fair Trading website.

"Cartels are generally recognized as the most serious form of anti-competitive behaviour. For this reason the Authority has identified the pursuit of cartels as its top priority." Irish Competition Authority, *Cartel Watch, Guidelines on Cartels: Detection and Remedies.*

"Fighting cartels is one of the ACCC's highest priorities." Australian Competition and Consumer Commission website.

"Because of the harm that cartel violations cause, the Justice Department's number one antitrust priority is criminal prosecution of those activities." United States Department of Justice, Antitrust Division, Antitrust Enforcement and the Consumer.

[4] While some jurisdictions' laws use the word "cartel" to refer to a broad array of antitrust violations, in this paper, the words "cartel" and "hard core cartel" are used interchangeably, and thus, the word cartel is only meant to refer to a hard core cartel.

[5] The bibliography provides sources that were used during the compilation of this paper or that were suggested by members, yet it does not purport to be comprehensive.

Reflecting the widespread consensus, the basic statutory elements that define a hard core cartel are remarkably consistent across jurisdictions. The three common components of a cartel are:

1) an agreement;

2) between competitors;

3) to restrict competition.

The **agreement** that forms a cartel need not be formal or written. Cartels almost invariably involve secret conspiracies. The term **competitors** most often refers to companies at the same level of the economy (manufacturers, distributors, or retailers) in direct competition with each other to sell goods or provide services. The aspect of a **restriction on competition** distinguishes conduct that targets open competition from benign, ordinary course of business agreements between firms.

Further, in describing the typical types of hard core conduct, four categories of conduct are commonly identified across jurisdictions:

- **price fixing;**
- **output restrictions;**
- **market allocation;** and
- **bid rigging.**

In some jurisdictions, bid rigging and output restrictions are also sometimes regarded as subsets of price fixing and/or market allocation, as the impact is to affect pricing on bids or by reducing output or to assign or divide certain contracts or market share between competitors. Regardless of the specific categorization, the categories all have in common conduct whereby competitors fix an aspect of a free market.

Conduct falling within the four categories can take many forms. Price fixing is any agreement among competitors to raise, fix, or otherwise maintain the price for a product or service. Price fixing can include agreements to establish a minimum price, to eliminate discounts, or to adopt a standard formula for calculating prices, etc. Output restrictions can involve agreements on production volumes, sales volumes, or percentages of market growth. Market allocation or division schemes are agreements in which competitors divide markets among themselves – competing firms allocate specific customers or types of customers, products or territories. In a bid-rigging conspiracy, competitors may agree to rotate winning bids, may divide bids, or one bidder may agree to submit an artificially high or “comp” or “cover” bid in return for a subcontract or payoff. In other words, competitors agree to restrict or eliminate competition for some piece of defined business, whether it is a sale, a contract, or a project.

b) Commonality in Informal Definitions

Though the term “hard core cartels” is not a common statutory term with a formal definition, antitrust agencies have other means, besides statutory language, to explain their mission, goals, and what constitutes prohibited behavior. These means include enforcement decisions, speeches, guidelines or informational publications, and policy guides. When defining or explaining hard core cartel conduct in these more informal outlets, the world’s antitrust

agencies speak in a common language. The simplified, less legalistic definitions of cartel activities designed for non-legal audiences are strikingly similar:

> *"Cartels are secret agreements between firms to fix prices or share markets between them."* Irish Competition Authority, *Cartel Watch, Guidelines on Cartels: Detection and Remedies*[6]

> *"What is a cartel? If several competing enterprises co-ordinate their market conduct for the purpose of eliminating competition this is called a cartel."* Bundeskartellamt, *The Bundeskartellamt and its tasks*

> *"Cartels mean express or tacit conventions, promises or agreements among firms to fix price and limit volume of production and sales, and selection of trading partners. They are classified in terms of the object of restriction into price cartels, volume cartels, market allocation cartels, and bid riggings."* Japan Fair Trade Commission, *What Practices are Subject to Control by the Antimonopoly Act?*

> *"Cartel definition: Arrangement(s) between competing firms designed to limit or eliminate competition between them, with the objective of increasing prices and profits of the participating companies and without producing any objective countervailing benefits."* European Commission, DG Competition, *Glossary of Terms used in EU Competition Policy*

> *"What is a Conspiracy? When business competitors agree: on the prices that they will charge their customers; not to compete for certain customers; not to compete in a particular product or geographic market; or to prevent or impede other businesses from competing in a market."* Canadian Competition Bureau website

> *"Cartels are agreements between undertakings, such as agreements and decisions, or concerted practices which restrain competition . . ."* Netherlands Competition Authority website

> *"A cartel is generally considered to include conduct by two or more competitive businesses such as: price fixing; market sharing including bid-rigging or customer sharing; and/or production or sales quotas."* Australian Competition and Consumer Commission website

2. 1998 OECD Definition

Responding to the emerging international consensus, in 1998, the OECD Council adopted the *Recommendation Concerning Effective Action Against Hard Core Cartels* (hereinafter "the Recommendation" or "the OECD Recommendation") that recommends that member countries ensure that their competition laws deter cartels and provide for adequate procedures and institutions to detect and punish cartels. As motivation, the Recommendation cites the universally recognized economic harm of cartel conduct and states that *"hard core cartels*

6 Full citations for competition authorities' websites are listed in the attached bibliography.

are the most egregious violations of competition law." The OECD Recommendation further urges increased international cooperation in anti-cartel enforcement. The Recommendation was the first statement of international consensus on anti-cartel enforcement, and remains the most influential attempt to formulate a consensus definition to date. It is a landmark statement of the recognition of the harmful nature of hard core cartels and has helped spur worldwide commitment to combating the damage they inflict.

The Recommendation identified four types of conduct as falling within the definition of a hard core cartel:

> *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 . . .*

The Recommendation was the result of extensive negotiation and precise drafting intent on capturing a consensus view. Still, even as an overarching statement of consensus, on closer inspection, the Recommendation reflects some of the difficulties in delineating specific hard core cartel conduct across jurisdictions and the current limits of convergence in this area. Thus, the Recommendation states that the general definition above:

> *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.*

Various jurisdictions have differing forms of anti-cartel legislation and differing exemptions, and utilize differing standards of evaluation. As the OECD recognized, *"If an OECD 'definition' sought to capture the differences among Members' laws, it would be less a definition than a compendium, and if it did not capture those differences it would have no operational utility and could be misleading."*[7] As discussed below, the precise issues of whether to draft a general anti-cartel law versus a more specific statute, the standard of evaluation of anti-cartel conduct, and exemptions present challenges to be addressed by each member country in the enactment, implementation, and enforcement of its anti-cartel legislation.

The Subgroup evaluated the definition in the OECD Recommendation as a consensus definition. The Subgroup found the definition to be adequate and appropriate as a statement of the basic parameters of the definition of a hard core cartel. There were no substantial suggestions for improvement. Several members suggested minor clarifications that the definition include explicit mention of profit margins or the manipulation of prices. The current text, however, is appropriately drafted to encompass these minor suggestions within the concept of price fixing, especially since the definition relies upon each member's interpretation of its law.

[7] OECD, *Hard Core Cartels,* n. 11 at 45 (2000).

3. Complicating Issues in Anti-Cartel Laws

While there is widespread agreement on the basic elements of what constitutes a hard core cartel, the enactment, implementation, and enforcement of an anti-cartel law raise several complicating issues for a jurisdiction to consider. These complicating issues create definitional and enforcement differences from jurisdiction to jurisdiction. The OECD definition does not provide guidance on the specifics of enacting, implementing and enforcing anti-cartel laws. Discussed below are some of the most common issues that have arisen in developing anti-cartel legislation and enforcing those laws.

a) General v. Specific Law

A primary drafting challenge is whether to identify the specific forms of concerted conduct that are prohibited, i.e. whether to enshrine a list of examples of types of prohibited conduct in the law.

Some jurisdictions prefer to have a general law that only states the broad prohibition against agreements not to compete. The identification of specific conduct that violates the prohibition is then left to be determined through enforcement. Accumulated enforcement decisions will develop categories of conduct that are repeatedly condemned under the law, providing practical guidance for the public, even though there is no precise statutory or formal definition of cartel conduct. In addition, enforcers provide public guidance through speeches and publications. This approach recognizes that behavior cannot always be neatly categorized and allows for flexibility and development in enforcement analysis.

Other jurisdictions prefer to enact more detailed laws that will follow a broad prohibition with a list of actions that are considered violations. This approach provides a great deal of transparency in the law by identifying prohibited practices.

b) Exemptions

Virtually every jurisdiction has exemptions from anti-cartel laws, either in connection with regulation of an industry or because a legislative choice has been made not to apply antitrust laws to certain conduct or industries. For example, some jurisdictions have specific exemptions for certain collective bargaining agreements, agricultural cooperatives, research and development activities, and under certain circumstances, small or medium enterprises. Exemptions are based on domestic policy objectives that differ from jurisdiction to jurisdiction and sometimes reflect historical conditions or perceptions that may no longer warrant the exemptions. They do not reflect a common agreement that certain conduct or sectors be exempt from the general prohibition of collusion.

The OECD Recommendation recognizes that members may exclude certain industries or activities from anti-cartel enforcement. Because such exemptions deviate from the legal and economic foundations that form the basis for the prohibition against hard core cartel behavior, the Recommendation urges that exemptions be transparent and no broader than necessary to achieve their policy objectives. Since exemptions create some differences in what is considered an illegal cartel from jurisdiction to jurisdiction, and since such exemptions are

rarely premised on competition principles, the OECD Recommendation's provisions regarding transparency and scope offer useful guidance for any jurisdiction considering exemptions.

c) Inclusion of Vertical Conduct

General statutory prohibitions against anticompetitive agreements are often broad enough to apply to both horizontal restrictions between competitors and vertical restrictions between companies at different levels of distribution. In addition, in some jurisdictions, conduct such as exclusive dealing, resale price maintenance, tying, or vertical territorial restrictions are specifically listed in the same statutory prohibitions with horizontal price fixing or market allocation between competitors.

Agencies have become more knowledgeable about the pro-competitive aims of many vertical arrangements, and the general trend has been towards more permissive treatment of conduct in the vertical context. While collective vertical conduct sometimes has the same statutory prohibition as collective horizontal restrictions, and the two may be analyzed under similar standards in some jurisdictions, there is no consensus to include vertical conduct in the category of hard core cartel conduct.

d) Standard of Analysis

Another challenge for antitrust enforcement is whether hard core cartel conduct should be treated as *per se* illegal or analyzed under an effects test. A *per se* rule for evaluating hard core cartel conduct focuses solely on whether certain conduct took place. In many jurisdictions, hard core cartel conduct is *per se* illegal because of its pernicious effect on competition and lack of redeeming economic value. Thus, the *per se* approach does not require an agency to prove harm to competition and does not allow parties to claim an efficiency justification. Certain agreements are conclusively presumed to be unreasonable and therefore illegal, without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Under a *per se* analysis, companies may not demonstrate the alleged reasonableness or necessity of the challenged conduct. For example, price fixing cannot be justified by arguing that it was necessary to avoid cutthroat competition, or that it resulted only in reasonable prices. The *per se* approach can provide certainty with respect to the legality of specific conduct.

In other jurisdictions, various effects tests are used to analyze hard core cartel conduct. Rather than only looking to whether specific prohibited conduct took place, such tests go a step further and require that a certain effect be shown. For example, some jurisdictions require a showing of an undue or substantial lessening of competition or allow an efficiencies defense. In addition, some jurisdictions utilize a hybrid approach by allowing the prosecution of certain types of cartel behavior, such as price fixing or bid rigging, on a *per se* basis and other types of cartel conduct, such as output restrictions or market allocations, on an effects basis. An effects approach that allows for justification of hard core cartel conduct appears to be contrary to the consensus that such conduct is devoid of pro-competitive benefits.

4. Conclusions

With respect to the key elements of a hard core cartel and the enforcement priority such cartels demand, antitrust enforcers speak a common language. There is widespread agreement among jurisdictions that the essence of hard core cartel conduct is that the consumer believes he or she is making a purchase in a competitive market when, in reality, conspirators secretly agreed not to compete. There is also widespread agreement that prosecution of such activity should be a top enforcement priority because hard core cartels, *"the most egregious violations of competition law,"* raise prices, restrict supply, reduce innovation, and can lead to artificially concentrated markets, waste, and inefficiency.

However, certain definitional and analytical details reveal that the common language of anti-cartel enforcement has many dialects. Jurisdictional differences in the scope of definition of cartel conduct and the application of its prohibition are seen in the varying specificity of prohibitions and specific exemptions from the law, as well as in the categorization of vertical conduct. Analytical standards can differ depending on whether a jurisdiction treats hard core behavior as a *per se* offense or one entitled to an effects evaluation.

As seen from the OECD experience, one common definition that addresses all aspects of defining and analyzing a hard core cartel is not attainable due to these differences. However, these differences have not obscured the anti-cartel consensus that has led to a strengthening of enforcement around the world and increased cooperation among jurisdictions.

Hard Core Cartel Bibliography

Australian Competition and Consumer Commission: *Cartels web page*. Available from: http://www.accc.gov.au/content/index.phtml/itemId/549116.

Australian Competition and Consumer Commission (2003): ACCC leniency policy for cartel conduct. Available from:
http://www.accc.gov.au/content/index.phtml/itemId/454181.

Bundeskartellamt: *Notice 68/2000 guideline relating to the setting of fines*. Available from: http://www.bundeskartellamt.de/wDeutsch/publikationen/bonusregelung.shtml.

Bundeskartellamt: *The Bundeskartellamt and its tasks, page 5. ("What is a cartel?").* Available from: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Broschure_engl.Jan02.pdf.

Canadian Competition Bureau, Pamphlet Series:

Reaching an agreement with competitors. Available from:
http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct01077e.html and

Bid Rigging. Available from:
http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct01076e.html.

Commission on Protection of Competition, Republic of Bulgaria. Available from: http://www.cpc.bg/public/index.php?id=49&letter=h

Conseil de la Concurrence: *Hard core cartels. The French approach through an analysis of the case law of the Conseil de la Concurrence. A study for the International Competition Network.* (Paris 2004)

European Commission, DG Competition: *EU Competition Policy and the Consumer, pages 2-3 ("Making Sure Companies Play Fair.").* (Brussels 2004) Available from:
http://europa.eu.int/comm/competition/publications/consumer_en.pdf.

European Commission: *Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (2002/C45/03).* (Brussels) Available from:
http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_045/c_04520020219en00030005.pdf.

European Commission, DG Competition: *Glossary of Terms used in EU Competition Policy, page 8.* (Brussels 2002) Available from:
http://europa.eu.int/comm/competition/publications/glossary_en.pdf.

European Commission: *Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty (98/C9/03).* (Brussels) Available from:

http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/c_009/c_00919980114en00030005.pdf.

Fels, A.: *The Trades Practices Act and the world's best practice: proposals for criminal penalties for hard-core collusion.* Speech to the Australian Institute of Criminology, 2 September 2002. (Australian Competition and Consumer Commission 2002) Available from:

http://www.accc.gov.au/content/index.phtml/itemId/110787.

Griffin, James M.: *An Inside Look at a Cartel at Work: Common Characteristics of International Cartels.* Speech Before American Bar Association Section of Antitrust Law 48th Annual Spring Meeting (April 6, 2000). Available from:

http://www.usdoj.gov/atr/public/speeches/4489.htm.

Irish Competition Authority, Cartel Watch, Guidelines on Cartels: *Detection and Remedies.* Available from:

http://www.tca.ie/reports/booklets/cartelwatch.pdf.

Japan Fair Trade Commission: *What Practices are Subject to Control by the Antimonopoly Act? (Section 3-1, "How Does this Apply to Cartels?").* Available from:

http://www2.jftc.go.jp/e-page/aboutjftc/role/q-3.htm.

Legislation

Australia: *Trade Practices Act 1974 (No 51 1974), section 45.*

Brazil: *Law 8,884/94 of June 11, 1994, Title V, Chapter II, Articles 20 and 21.*

Canada: *Competition Act R.S.C. 1985, c. C-34, Part VI, sections 45-49.*

European Union: *Treaty establishing the European Community: Article 81.*

Germany: *Restraints of Competition Act 1958 (ARC) (amended 2004), sections 1-4.*

Hungary: *Competition Act (1996/LVII), Articles 11 and 13.*

Ireland: *Competition Act, 2002, Part 2, section 4.*

Japan: Act *Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (Antimonopoly Act), sections 2, 3, 6, 8.*

Korea: *Monopoly Regulation and Fair Trade Act.*

Mexico: *Federal Criminal Code and the Federal Law of Economic Competition 1993, Article 9.*

New Zealand: *Commerce Act 1986.*

Russian Federation: *Law on Competition, Article 6.*

South Africa: Competition Act 89 of 1998 (as amended), section 4(1)(b)(i), (ii) and (iii).

Spain: *Competition Defence Act (Law 16/1989 on the Defence of Competition), Article 1.*

Switzerland: The *Federal Act on Cartels 2004 (Acart, RS 251), Article 5 Acart.*

United Kingdom: *The Competition Act 1998 (Chapter 41), section 2 and the Enterprise Act 2002 (Chapter 40), section 188.*

United States of America: *The Sherman Act 1890 (15 U.S.C. § 1).*

Venezuela: *Law to Promote and Protect Free Competition, Article 10.*

Netherlands Competition Authority: *Prohibition on Cartels*. Available from:
http://www.nmanet.nl/en//Over_de_NMa/Werkveld_NMa/Kartelverbod/default.asp?ComponentID=318&SourcePageID=326#1.

Office of Fair Trading: *Cartels - What is a cartel?* Available from:
http://www.oft.gov.uk/Business/Cartels/what+is+a+cartel.htm.

Office of Fair Trading: *OFT's Guidance as to the Appropriate Amount of a Penalty,* (OFT 423, 2004). Available from: http://www.oft.gov.uk/NR/rdonlyres/3A31B3A6-77C2-4D39-8784-623CB1C05963/0/oft423a.pdf.

Office of Fair Trading: *Leniency in cartel cases*, (OFT 436, 2005). Available from: http://www.oft.gov.uk/NR/rdonlyres/CC73E8F4-2433-48C4-A3BC-5F3255C58AAF/0/oft436.pdf.

Office of Fair Trading: *Cartels and the Competition Act 1998 – A guide for purchasers*, (OFT 435, 2005). Available from:
http://www.oft.gov.uk/NR/rdonlyres/4BF964E6-BD83-4D1D-ADDA-8598FA8FE070/0/oft435.pdf.

Organisation for Economic Co-operation and Development: *Hard Core Cartels, Recent Progress and Challenges Ahead.* (Paris, OECD Publications, 2003) Available from:
http://www.oecd.org/document/36/0,2340,en_2649_37463_2516132_1_1_1_37463,00.html.

Organisation for Economic Co-operation and Development: *Scoping Paper for Possible Revisions to the Cartel Recommendation.* (Paris, OECD Publications, 2003) Available from:
http://www.oecd.org/findDocument/0,2350,en_2649_37463_1_1_1_1_37463,00.html.

Organisation for Economic Co-operation and Development: *Using Leniency to Fight Hard Core Cartels.* (Paris, OECD Policy Brief September 2001). Available from:

http://www.oecd.org/document/3/0,2340,en_2649_201185_1890435_1_1_1_1,00.html.

Organisation for Economic Co-operation and Development: *Hard Core Cartels.* (Paris, OECD Publications, 2000). Available from:

http://www.oecd.org/dataoecd/39/63/2752129.pdf.

Organisation for Economic Co-operation and Development: *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, 25 March 1998, paragraph I.A.2.* (Paris, OECD Publications, 1998). Available from:

http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(98)35.

South African Competition Commission: *The Competition Act: A Guide to Prohibited Practices, pages 7-8. ("Restrictive Horizontal Practices").* Available from:

http://www.compcom.co.za/resources/Brochure2.pdf.

Temby, Shaun: *Legal update: Criminal sanctions for "hard core" cartel behaviour – just how worried should you be?* (Perth (Australia), Deacons, 2004). Available from:

http://www.deacons.com.au/news/article.asp?nID=557.

U.S. Department of Justice, Antitrust Division: *Antitrust Enforcement and the Consumer.* Available from:

http://www.usdoj.gov/atr/public/div_stats/9142.htm.

U.S. Department of Justice, Antitrust Division (2003): *An Antitrust Primer for Federal Law Enforcement Personnel.* Available from:

http://www.usdoj.gov/atr/public/guidelines/201436.htm.

U.S. Department of Justice, Antitrust Division (2001): *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They are and What to Look For.* Available from:

http://www.usdoj.gov/atr/public/guidelines/primer-ncu.htm.

World Trade Organization: *Report of the Working Party on the Interaction between Trade and Competition Policy to the General Council.* (Geneva, WTO, 2003)

World Trade Organization (2002): *Communication from Switzerland: Provisions on Hard Core Cartels.* Available from:

http://www.seco-admin.ch/imperia/md/content/aussenwirtschaft/wto/wt_wgtcp_w_194_e.pdf.

International
Competition
Network

Part II
Effective Institutions

II

PART II: EFFECTIVE INSTITUTIONS

This part will discuss one of the most fundamental building blocks of any anti-cartel regime: the way the antitrust authority organises itself in order to be well set up to effectively detect, investigate and often also prosecute and sanction cartel behaviour.

The pursuit of cartels requires certain specialist skills which differ from the skills required for the investigation and prosecution of other infringements of competition law. Cartel offences such as price-fixing, volume quotas, market sharing or collusive tendering are considered in most jurisdictions as *per se* infringements for which it is almost universally accepted that they restrict competition. Hence, the focus lies on proving the existence of the arrangement itself rather than demonstrating its impact on the market in economic terms.

At the same time, companies that agree to organise and/or participate in cartels, go to great lengths to conceal their illegal behaviour. As a result, in order to find quality evidence, agencies have to rely on specialised evidence gathering tools.

The most efficient tools to gather evidence are the use of leniency programmes, on-site searches and raids, IT-forensics and taking of witness statements. In addition, some jurisdictions prosecute cartel infringements as a criminal offence which means that specific procedures are required, which generally differ from the procedures applicable to other infringements of the competition law.

Agencies have responded to these practical and legal challenges in a variety of ways. To some extent, this variety reflects the many factors which condition an agency's activities, such as the size of the agency, the institutional environment, the legal framework, the administrative or criminal nature of the sanctioning system, an agency's direct access to specialist skills and its scope for cooperation with other governmental (or even private) entities.

Yet despite some notable differences, observers did note more recently some convergence in practice and approach among agencies. This report sets out to identify the increasing points in common, but also to shed light on the remaining differences.

In doing so, our point of departure is to recall the framework into which agencies' anti-cartel work is invariably embedded (section 1). Both the institutional environment (a) and the question of whether cartels are pursued administratively or criminally (b) have a key influence over which organisational arrangements an agency may find suit it best.

Section 2 reviews a number of aspects relevant to the basic framework of agencies' anti-cartel organisation. Every agency that is reflecting on its optimal internal organisation will have to consider such issues as (a) whether or not to create a dedicated cartel unit, (b) whether or not to leave the prosecution of cartels in the hands of the same set of people as those who are conducting the investigation, and (c) to what extent it is appropriate and efficient to rely on the cooperation of other governmental or even private entities when pursuing cartels.

The last section (section 3) focuses on a number of organisational requirements which are specific to the fight against cartels. Only a proper understanding of these requirements, and a

reflection of these requirements in their internal organisation, will allow agencies to put their scarce resources to maximum effect in the fight against cartels.

1. The Institutional and Legal Framework

Few would dispute that the institutional and legal framework into which a competition agency is invariably placed is one of the most influential factors in determining the optimal organisation of its anti-cartel capabilities. Therefore, as a backdrop to the more cartel-specific discussions, it may be useful to begin by recalling some of the main institutional and legal features of the respondent jurisdictions.

a) Institutional Embedding

Competition agencies come in a wide variety of forms and functions.[8] For example, they vary in terms of their administrative, political and financial independence: some are stand-alone agencies, others are integrated into a department of government, and yet again others may feature quasi-judicial characteristics. As concerns their mission, a few agencies may focus on cartels, whereas the vast majority of agencies perform other tasks as well, such as control of mergers, protection against abuse of a dominant position, monitoring of state subsidies, or consumer protection. Depending on these other tasks, a competition agency may or may not have access to certain skills among its own ranks.

Sometimes the terms "institution" and "organisation" may be used interchangeably. For the purposes of this report, however, they depict two differing concepts, as much as one inevitably influences the other: hereinafter, the term **institutional setting** refers to the constitutional environment into which an agency is embedded, such as in particular its relations with courts or other agencies involved in the implementation of competition policy. These issues are beyond the direct influence of competition agencies, and therefore outside the remit of this report.

In contrast, the term **organisational arrangements** refers to the practical measures every agency can take autonomously, both internally as well as in its protocols of cooperation with other relevant bodies, with a view to fulfilling its mission effectively. Customarily, agencies enjoy a considerable degree of discretion as to how they structure these internal and external working arrangements.

The typical mission of a competition agency in the cartel field comprises essentially four different tasks: the detection of cartel behavior; the investigation of potential cartels, the prosecution of suspected cartelists (companies and/or individuals), and the ultimate power to take enforcement decisions, that is to sanction proven offenders. The internal organisational arrangements that agencies make should ideally represent the optimal balance to carry out

8 On this point, see the ICN Report *Advocacy and Competition Policy* (2001), available at http://www.internationalcompetitionnetwork.org/advocacyfinal.pdf.

all of the aforementioned activities. However, not all of these tasks are attributed to all agencies in equal measure, and some agencies may not perform some of these tasks at all.

This difference is most notable when considering the power to take enforcement decisions. A fundamental distinction has to be made between systems that vest the institutional power to take enforcement decisions in the same legal entity which also investigates the case, and regimes which reserve this power to the courts or administrative tribunals. Among the cartel regimes surveyed for this report, the number of jurisdictions that follow the first model slightly outnumber the representatives of the second model. An agency that both investigates and sanctions cartels may well face different issues of efficiency and due process, and thus different needs in terms of its ideal organisational setup, than an agency that is not directly concerned with the sanctioning of cartels. These differences may define, for instance, the investigatory powers that are allocated to any agency, its scope for reliance on oral testimony, and its scope for cooperation with other governmental or even private entities.

In this context it should be noted that jurisdictions in the first group, that is those to which powers of investigation, prosecution and sanctioning are assigned, do not necessarily entrust all those procedural stages to the same set of people within that body. It is not uncommon to assign the authority to take enforcement decisions to a special committee within the same authority. The members of this committee are in most cases appointed politically for a fixed term, whereas the investigation of a case is carried out by career administrators. The European Commission and the competition authorities of Japan, Hungary, Mexico, Switzerland, Turkey and Venezuela are good examples of this separation of functions. Other jurisdictions in this group, such as Germany and Slovakia, however, do not make such a formal functional distinction.

As for the second group of jurisdictions, which delegate the power to take enforcement decisions to judicial or administrative tribunals, the division of tasks and powers between the competition agency and the tribunal can be arranged in various ways. In this group, the prevalent system is that exemplified by Australia, Chile, South Africa, Spain or the United States, where the investigatory agency will also assume the role of prosecutor before the competent judicial or administrative body. In other instances, such as Canada and Ireland, the competition agency will hand over the investigation file to a representative of the national prosecutor's department to prosecute the case in court. Similarly, for the rare cases it does not decide itself, Japan's JFTC has the exclusive power to file certain infringements of the competition law with the national prosecutor who then brings the case before a court.

The case of Israel exemplifies a cross-over of these two solutions, since the country's attorney general customarily authorises certain members of the Israeli Antitrust Authority to take over the prosecution of antitrust offences, subject to the guidelines and instructions of the attorney general. In this context it was noted:

> *The competition agency was challenged several times in court on this issue. It was argued that there wasn't enough separation between the two institutions, for they are both subordinated to the head of the competition agency. This argument was dismissed. In reaching their decision, the courts took into account the fact that the two departments are physically and administratively separated; that they use different*

personnel; that there is institutionalized procedure of transferring a case from the investigating department to the legal department; and that the final decision to indict is done by the legal department and not by the investigation department.

b) Criminalisation

In broad terms, the two groupings mentioned above stand apart not only in terms of the identity of the sanctioning authority, but also because they by and large mirror the dividing line between administrative and criminal prosecution systems. As it would be expected, the imposition of criminal, including custodial, sanctions on individuals is generally the prerogative of courts. ***Box 1*** exemplifies the treatment of a cartel case by an agency operating in such a criminal setting.

Box 1: The Chronology of a Cartel Case I – Criminal Prosecution Setting

Detection

Knowledge of an alleged cartel is brought to the attention of the cartels unit by way of information obtained from public sources, complainants, immunity applicants or other means.

A preliminary examination is commenced. If it provides grounds to believe that an offence has occurred or is likely to occur, then the examination matures into a formal inquiry.

Its commencement provides the competition agency with the right to apply to a court for orders employing formal information-gathering processes such as production orders, or orders to attend at an examination. In addition, the competition agency can search premises once it has established reasonable grounds to believe that an offence has been committed. Following the commencement of an inquiry, at the request of the cartels unit, a lawyer from the ministry of justice is appointed to provide advice to the agency during its investigation and to represent the agency in all court related activities. As the ministry of justice provides investigative advisory services to the agency, lawyers from that ministry are involved in cartel investigations from the earliest stages.

Searches / Inspections

If appropriate, searches are conducted by cartels unit, usually in conjunction with members of the special IT investigations team who assist in the searching of computers and electronic equipment. In instances where original documentation is provided or obtained in response to a court order, the competition agency will code and photocopy the documents and have them returned within 60 days of their reception. Coded evidence is reviewed and triaged and selected documentation is scanned into an electronic litigation support system. While the competition agency is the midst of creating an internal scanning centre, it historically has used outside third-party services for this purpose. In any event, the agency's support team plays a predominant role in ensuring that the scanning has been completed correctly and in organizing the material into a useable format in the electronic litigation support system.

Investigation

The cartels unit will interview witnesses. This may be done in conjunction with the ministry of justice when there is an immunity applicant.

The agency's economic policy unit assists in the economic analysis of cartel behaviour, and may be joined by industry and economic experts from the private sector.

After evidence has been reviewed, investigators in the cartels unit will determine whether there are grounds to refer the matter to the ministry of justice for prosecution or whether the case should be discontinued. Other case resolutions are possible, such as investigative visits to promote education and compliance, prohibition orders and guilty pleas.

Prosecution

Cartels may be prosecuted as indictable criminal offences and are adjudicated in any superior court of criminal jurisdiction or in the competent court, regardless of whether there is a plea agreement or contested proceeding.

Successful prosecutions under the criminal provisions of the Act attract significant individual and corporate fines and imprisonment. In addition to fines or imprisonment, orders prohibiting the continuation of repetition of all anti-competitive conduct may be imposed by a court.

In contrast, the imposition of administrative fines on companies falls mostly, but not always, into the realm of administrative authorities. The example in ***Box 2*** illustrates how a cartel case may typically be treated throughout the various procedural stages by an agency operating in an administrative setting. The exceptions to the rule in this respect are jurisdictions like South Africa which rely on judicial tribunals for the imposition of administrative sanctions. In Spain, it is an administrative tribunal which takes the enforcement decision.

Box 2: The Chronology of a Cartel Case II – Administrative Setting

Detection

Typically, a cartel case would come to the attention of the competition agency by means of an immunity/leniency application. Such an application has to be made to a centrally located contact point, after which it is allocated to the unit responsible for the matter. Other possible, but less frequent ways of detection, may include complaints, informants, tip-offs from other competition authorities, or on the basis of information obtained by the agency using its own means of investigation.

Searches / Inspections

After the allocation of a case, the next step in cartel cases would normally be the organisation of an on-the-spot search or inspection. Inspections are usually carried out in business premises, including the land and means of transport of the undertaking concerned. During the inspection, the agency is entitled to examine the books and other records related to the business and to take in any form copies or extracts from such books or records. It can seal any business premises and books or records for the period and to the extent necessary for the inspection. Any representative or

staff of the undertaking can be asked explanations on facts or documents relating to the subject-matter and purpose of the inspection. Their answers will be recorded in writing.

Recently, the agency's powers of inspection have been extended to include other premises than business premises, including the private homes of the directors, managers and other members of staff of the undertakings concerned. This new power can only be used where there is "a reasonable suspicion" that evidence may be kept in these other premises and subject to judicial prior authorisation.

Investigation

The unit in charge of the investigation will then continue the fact-finding stage by sending out written requests for information to relevant undertakings or association of undertakings, or by taking oral statements. Where the competition agency sends out a request for information in the form of a decision (as opposed to a simple request), the receiving undertaking is under a duty to reply, failure of which may lead to periodic penalty payments of maximum 5% of the average daily turnover of the preceding business year per day and, ultimately, of fines up to 1% of the total turnover in the preceding business year. Oral statements can be taken from any natural or legal person who consents to be interviewed.

Prosecution

If the competition agency is convinced that there is evidence of a cartel infringement, it will then formally open proceedings by serving a statement of objections to the parties involved.

The parties will then have opportunity to access a non-confidential version of the documents in the competition agency's file. To that extent, they will receive, together with the statement of objections, a CD-ROM containing a non-confidential version of the agency's file.

The parties have the opportunity (approximately 2 months, but it varies) to respond to the statement of objections in writing.

If any of the parties concerned wishes so, they also receive the opportunity to express their views during an oral hearing organised under the presidency of the hearing officer, who is in charge of safeguarding the rights of defence of the parties and the right to be heard.

Duly taking into account all observations made by the parties, the competition agency then finalises its proposal for a decision which it submits for consultation to a committee of competition experts, both on the substance of the draft decision and on the proposed sanction.

The proposal for decision is then submitted to the decision-makers who adopt the final decision. A non-confidential version of it is subsequently made public.

It is open for the parties to appeal against the final decision before the competent court which reviews the legality of the decision.

The apparent logic that criminal penalties on individuals are administered by courts whereas administrative fines on companies are often left with administrative authorities is also exemplified by those jurisdictions that have concurrent criminal and administrative prosecution of cartel behaviour. For example, in the United Kingdom, the criminal prosecution of individuals falls, as a general rule, into the competence of the Serious Fraud Office, the government's prosecution agency for serious and complex fraud (although the national competition authority, the Office of Fair Trading, can also prosecute the offence), whereas administrative fines

on companies are imposed exclusively by the Office of Fair Trading. Also Ireland, Israel, Turkey and Slovakia have concurrent administrative and criminal sanctions.

How does the criminal or administrative nature of cartel investigations influence an agency's optimal organisational set up? - Broadly speaking, the criminalisation of cartel behaviour can require three sets of issues to be considered:

Firstly, it is imperative to build up the legal expertise to prosecute cartel cases in such a manner that the incriminations withstand the particularly demanding legal standards of criminal procedure, and different standards of proof and evidence handling. One agency concerned succinctly summarises its view:

> *Given that most cartel investigations are criminal, we feel strongly that cartel investigations ought to be carried out by Officers with experience in criminal investigations. Persons unfamiliar with the special rights of the accused, etc., are ill-equipped to work on these matters. Moreover, there are special skill sets associated with criminal interrogations, searches, etc.*

Secondly, for those jurisdictions which have opened the possibility of concurrent administrative and criminal prosecution, a number of practical issues arise that an agency has to consider early in its investigation. The respective procedures involve different standards and schedules, and accord different rights to different parties. Therefore, representatives from two agencies concerned send a message of caution:

> ***1.*** *The cartels unit will have made a determination very early as to whether the case should be treated as a civil or criminal investigation. Because of special rights accorded to suspects in criminal investigations, it is important that the case be appropriately characterized at an early stage. Because of these rights, movement from a civil investigation to a criminal investigation presents problems. On the other hand, it may happen that a criminal investigation is ultimately brought as a civil case. Generally cartel matters are presumed criminal and treated as such. They may become civil because of evidentiary or other considerations.*
>
> ***2.*** *A key aspect of this procedure is that the civil and criminal investigation teams should be entirely separate from each other and the civil inquiry must not be conducted in such a way as might prejudice the criminal inquiry or its subsequent criminal prosecution.*

Thirdly, it is not uncommon that the criminalisation of cartel behaviour is accompanied by an extension of the investigative powers of the anti-cartel enforcers. This may well be justified in order to partially compensate the higher legal standards which inevitably apply in criminal procedures. Otherwise, the balance between the agency's investigative powers and the defendant's rights of defence may tilt too far in the direction of the latter.

It is clear that these extended investigative powers may create special organisational needs for the agency concerned which are irrelevant for an agency not commanding such powers. For example, when considering the following investigative powers recently granted to one

agency, it will become apparent that a proper use of these powers requires some expertise and know-how that may not customarily be available in competition agencies:

> *When investigating a suspected criminal cartel offence, the competition agency can make use of the following statutory powers:*
>
> - *to require information and documents;*
> - *to enter and search (both business and domestic) premises under a warrant;*
> - *to take voluntary statement;*
> - *to follow up voluntary statement with a compulsory statement;*
> - *to conduct 'intrusive surveillance', i.e. covert surveillance carried out in relation to anything taking place on any residential premises (including hotel accommodation) or in any private vehicle and involves the presence of an individual on the premises or in a vehicle or by means of a surveillance device to either hear or see what is happening within the premises or vehicle;*
> - *to interfere with property (i.e. property interference allows for the covert installation of, for example, a listening device in a property which would otherwise involve some element of trespass); and*
> - *to obtain access to communications data (for example, obtaining records of telephone numbers called).*
>
> *Non-compliance or obstruction is punishable with (up to) unlimited fines being imposed on an individual and/or imprisonment of up to a maximum of 5 years.*
>
> *Finally, the competition agency can also conduct directed covert surveillance (e.g. observing the movements of individuals from public space, such as the timing of a person's arrival at the office) and can make use of informants.*

2. The Basic Framework of Agencies' Anti-Cartel Organisation

a) Sectoral vs. Dedicated Cartel Units

A Matter of Principle or Pragmatism?

One of the key issues debated by agencies is whether to organise themselves internally along sectoral (transport, financial services, energy,…) or instrumental (cartel, mergers, …) lines, or whether to seek a combination of these two approaches. With several agencies currently in the process of implementing or considering changes to their internal structures, this question merits particular attention in the cartel area. For example, the European Commission announced in spring 2005 the creation of a new Directorate dedicated exclusively to the fight against cartels.

Some respondents to our questionnaire see great merit in building up industry-specific knowledge in sectoral units. These units typically treat cartel cases alongside merger and other antitrust cases. One of the key motivations for such a step is a desire to avoid too great a dependency on leniency as a source of cartel detection, since specific knowledge about certain industries is credited with increasing the likelihood of *ex officio* detection of cartels. Industry-specific knowledge may also enhance the quality of decision-making where consensual modes of settling a case, such as plea-bargaining, are not readily available.

However, a significant number of agencies argue that any intimate knowledge of the industry is of lesser importance when investigating and prosecuting cartels. These agencies take the view that the fight against cartels is such a technically and legally demanding field that only a specialist unit will be able to successfully launch and complete a cartel case, which will often include court proceedings. Therefore, an increasing number of agencies have invested considerable human resources in dedicated cartel units. One respondent echoed this trend in the following terms:

> *In the early 1990s the competition agency was reorganized to allow for separate criminal and civil litigating components. The results were immediate and positive. Specialization enabled agency attorneys to develop expertise and necessary skills to better and more efficiently detect, investigate, and prosecute criminal cartel conduct. Specialization has also allowed litigating sections or field offices to develop relationships with law enforcement agencies which assist the competition agency's overall efforts in detecting cartel activity.*

However, upon closer inspection, the opposing views described above may not be so far apart as they may appear. In fact, several agencies which have, as a matter of principle, opted for one or the other approach to internal organisation have taken practical steps to ensure that they will not lose some of the benefits mainly associated with the alternative approach.

On the one hand, some of the agencies with a well-established track record in cartel enforcement and which have opted for a mainly sectoral structure have nonetheless established anti-cartel support units for the fight against cartels alongside these sectoral units. As two agencies note:

> ***1.*** *The competition agency has had positive experience with its system of general allocation of competencies among the divisions according to economic sector, not type of cartel violation. The case handlers' knowledge of markets and economic sectors gained e.g. in merger proceedings, is a very important factor in detecting and investigating cartels. This knowledge of the markets is supplemented by the specific expertise of the policy and special cartel units which, if required, can give advice.*
>
> ***2.*** *As mentioned above, we do have a sectorally-based structure, so called "services" dealing with cartel and non-cartel cases by the same service. The aim was to facilitate the detection of cartels thanks to sector based knowledge. The experience up to now is quite positive. With the introduction of new investigation tools, however, we may consider concentrating a number of resources entirely on cartel detection, but we will*

first have to experience our new tools. This is in particular in view of the high degree of specialisation required for the investigation and prosecution of cartels.

On the other hand, agencies with a clear focus on cartel enforcement may rely on officials from other governmental bodies to assist in investigations which are relevant to the field of specialisation of those bodies. These officials can then make their sector-specific expertise available to the cartel fighters (see further below under “Cooperating with other Bodies”).

In conclusion, it therefore seems fair to say that, to be well-equipped to conduct cartel investigations effectively and efficiently, an agency ideally needs a considerable level of expertise in cartel-specific investigative tools, as well as some understanding of the industry examined.

Typical Features of Dedicated Cartel Units

Among those agencies which have decided to set up dedicated cartel units, what are the typical features of these units, and what are their concrete tasks? Looking at the replies at hand, some diverging and some common elements emerge.

First of all, one has to note that there are huge differences in terms of the size of these units. Their total staffing numbers, all included, can range from less than 10 to more than 250, including decentralised offices. To some degree, these numbers inevitably reflect the varying sizes of the competition agencies, and maybe even the immensely disparate sizes of the economies covered.

In view of these differences in context, it is arguably more interesting to look at the size of the existing dedicated cartel units relative to the overall manpower of their agencies (only considering their antitrust/merger functions). Here, the first observation to make is that there seems to be no agency which has attributed more than a third (32%) of its human resources to its dedicated cartel unit. A more common figure is to reserve between 20-25% of staff for the fight against cartels. Currently a number of agencies are however considering shifting a higher proportion of their staff to the cartel area.

In this respect, a distinction has also to be made between agencies which task their dedicated cartel units with the whole detection, investigation and prosecution of a cartel case, and those agencies which ask the cartel unit only to assist during the main investigative phase, but otherwise leave the handling of a case in a different organisational entity, as with the following agency:

The national competition agency set up a Special Unit for combating cartels. It assists the relevant other units in uncovering cartel agreements by deploying specialised personnel and material resources. One of the main tasks of the Special Unit is to organise all searches and to support other units in evaluating the electronic objects seized. It is also the main contact for all those wishing to avail themselves of the leniency programme. Apart from offering assistance with concrete cartel proceedings the Special Unit takes up and further develops basic conceptual issues regarding the uncovering and prosecution of cartels.

Those agencies belonging to this group typically devote a much more limited number (less than 20) or proportion (less than 10%) of staff to their cartel unit.

This observation leads to another remark: it can sometimes be challenging for agencies, never over-endowed with resources, to appropriately deal with the peaks and troughs of cartel enforcement in terms of staffing. To give but one example: specialist detectives may only be needed a few days per year, typically around those days when on-site searches and raids are organised. Many agencies have responded to this challenge with more flexible arrangements: they have built a core team of cartel specialists, and beef up this core team with general competition investigators depending on current needs. In view of the foregoing, one must therefore also be cautious about drawing conclusions about an agency's dedication to cartel enforcement by only relying on the number of officials grouped in a dedicated cartel unit.

In terms of qualifications, it is striking to see that on average between a third and half of all staff, including support staff, of the cartel units surveyed hold a legal degree. In comparison, economists make up only a small fraction of total staff. This is bound to reflect, first of all, the fact that many cartel laws outlaw cartels *per se*, without the need to adduce much economic evidence about the harm inflicted by the cartel. Moreover, cartel procedures are prone to raise complex legal and procedural difficulties, especially where cartel behaviour is criminalised. Finally, cartel investigations are routinely appealed against, and thus have to be conducted with a meticulous respect of due process.

As one of the most visible similarities between the various anti-cartel units examined, it should be noted that the staffing of cartel units tends to be more varied than that of other, more traditional anti-trust units. For one thing, many agencies saw the need to build up special IT skills in their cartel unit. These IT skills may be deployed both during searches and raids, and subsequently for the analysis and storage of large quantities of electronic and physical evidence (for example digitalised on CD-ROMs). Moreover, especially those agencies prosecuting cartels criminally sometimes incorporate either former police investigators in their ranks, or have detectives seconded to their office. As one agency noted:

> *The Special Unit is responsible for cartel enforcement. It is organized into teams comprised of detectives from the national police force who have been seconded to the agency as well as our own case officers. The latter generally have a law enforcement/ investigative background.*

One aspect where the existing cartel units take different approaches relates to the degree to which they have recourse to outside support in order to fulfil their mission. Whilst some agencies use internal staff for practically all tasks during an investigation or prosecution, others frequently have recourse to external governmental, and sometimes even private, assistance (cf. section c.).

To conclude on this point, after having looked at various models of cartel units, do we take the view that there is one superior, or "recommendable", organisational set up for the fight against cartels? We submit that this is not the case. There are too many extraneous factors which will influence an agency's choice of whether or not to invest in a dedicated cartels unit and, if so, which tasks to assign to that unit. This being said, the one conclusion one can

draw is that the fight against cartels requires certain specialist skills, and that many of the agencies with a good record of cartel enforcement see merit in concentrating these skills in separate organisational units.

b) Separating or Integrating Investigation and Prosecution

Another issue of debate between respondents revolves around the following question: should the treatment of a cartel case remain essentially in the hands of the same department, or should a case, once the initial investigation is completed, be passed on to a different unit for prosecution?

This question needs to be addressed by all agencies, irrespective of whether they have decided to organise themselves along more sectoral or cartel-dedicated lines. ***Boxes 3*** and ***4*** give one telling example in this respect: the different working arrangements between two agencies and the national prosecutor reflect the fact that the legal environments in which these two agencies are working differ fundamentally – one jurisdiction having criminalised cartel behaviour generally, the other having done so only for a small category of very well-defined cases. In addition, various agencies, although operating in different settings, express a rather nuanced view:

> ***1.*** *The interface between the investigative department, which is responsible for the gathering of information, and the legal department, which has to decide whether to indict, has taught us the importance of the separation between the two. It is beneficiary in most criminal cases, that a body that is not involved in the investigation analyzes the investigation material. However, in antitrust cases it is even more important. A set of facts can be seen by one body as naked restraint of trade, while another body will have a whole different perspective about it and will find in it pro-competitive aspects. The separation between the institution that investigates and the institution that prosecutes keeps a much more critical view on the cases that are investigated and insures that only the most serious cases are criminally prosecuted, while in other cases civil and administrative remedies are being used. That is not to say that one must avoid all interaction among the investigating institution and the prosecuting institution. On the contrary, our experience shows that cooperation among the two departments is most beneficial. The guidance and escorting of the investigation department by the legal department helps the investigation, keeps the investigation more focused, prevents legal mistakes and cuts down the time to prosecution. The help of the investigating department in analyzing the material by the legal department is substantial for the understanding of the case and the relevant markets and in reaching the right decision whether to prosecute.*
>
> ***2.*** *Incorporating both the investigation and prosecution of cartels into a unified staff affords better integration and analysis of cases throughout all stages of investigations and prosecutions. Conducting the investigation enables prosecuting staffs to have a better qualitative command of the facts of often large, complex cases. In addition, incorporated staffs have a better understanding of the strengths and weaknesses of potential witnesses and evidence. Participating in the investigation phase enables staffs to ensure that the necessary evidence is gathered for a successful prosecution.*

Box 3: Collaboration with the Public Prosecutor in a Criminal Setting

The national prosecutor's department and the competition agency share the same philosophy toward cartel activity and are committed to its suppression. The national prosecutor's department has established a dedicated competition law unit which is situated in physical proximity to the competition agency. There is an advanced level of joint resource planning, wherein both organisations' planning addressed the needs of both the competition enforcement and competition law programs. The national prosecutor's department's cartel unit is kept informed of agency priorities and needs through a seat at the enforcement agency's executive committee, and through its designation of a criminal practice coordinator, responsible for maintaining more immediate and direct contact with the agency's criminal enforcement team.

The flow of information between the national prosecutor's department and the agency is assured by a series of mechanisms. These include collocation of national prosecutor's department prosecutors with the agency and the integration of national prosecutor's department counsel into the investigation teams. Counsel are kept apprised of agency plans and intentions. They advise the case team on the nature of the evidence required, have input into the development of the theory of the case, and are in a continuing dialogue with the agency on the adequacy of the evidence. Counsel and investigators share the electronic networks and software systems.

Box 4: Collaboration with the Public Prosecutor in an Administrative Setting

In our jurisdiction, competition law infringements are generally administrative offences. There is only one exception: collusive tendering which under certain circumstances constitutes are criminal offence. The competent authorities for the criminal prosecution of individuals are public prosecutors, whereas the competition authorities remain competent for the fining of the companies in parallel to the criminal offences committed by the representatives. This division of competences results from doubts about the qualification of the already overloaded public prosecutors for the prosecution of competition law infringements, especially concerning the imposition of sanctions on companies. The competence of the competition authorities for the fining of companies should ensure that the experience of the competition authorities with cartel investigations is maintained.

Public prosecutors and competition authorities are free to exchange any information between one another from the start of their respective proceedings. There are no limits in this respect. Furthermore, there is a special provision in our procedural guidelines committing both to close cooperation in their respective proceedings. These guidelines stipulate that both authorities shall inform one another of a case of suspected collusive tendering as early as possible. In particular both authorities shall coordinate envisaged inspections and the further formal steps of the investigation (public charges in the case of criminal prosecution of the individuals, statement of objections and fine decision in the case of the fining of the companies). Generally, both authorities have a natural interest in a close cooperation of their proceedings because neither of them can prosecute the entire case (individuals and companies) of their own.

Whereas the prosecution of administrative offences is left to the discretion of the administrative authorities, criminal proceedings are governed by the principle of mandatory prosecution. In theory, there is no possibility of setting priorities in the prosecution of criminal offences. This means that, generally speaking, public prosecutors have to prosecute each and every case of collusive tendering if there is sufficient evidence to start the investigation.

Indeed, in spite of the principle of mandatory prosecution public prosecutors do not have the sufficient resources to prosecute all criminal cases with the same priority. However, collusive tendering is very often associated with other crimes linked to corruption, e.g. bribery. These crimes often attract public attention and are therefore generally accorded high priority by public prosecutors. So our experience as regards cooperation with public prosecutors is rather good.

__3.__ We believe that it is not a good idea to separate institutional structures dealing with different stages of the investigation because it is advantageous for the same investigators to be involved in a series of investigation as a whole from the viewpoint of accumulation of information and experiences on the case. The number of staff necessary to conduct investigation may vary at stages of the investigation (i.e. larger numbers of staff are required when on-the-spot investigations are conducted), but it can be dealt with by assistance from other sections temporarily.

As contradictory as these statements may appear, a closer look reveals that virtually all agencies try to come to terms with concerns of impartiality and due process. First of all, the “functional separation” that some agencies have implemented internally is achieved by other jurisdictions externally, namely when the law assigns the prosecution of cartels to the national prosecutor. Hence when analysing the checks and balances offered by a given jurisdiction, it is important to consider also its *overall* institutional and administrative environment.

Also other agencies that do not have such a visible separation of functions may, however, have taken certain steps to ensure that cases are scrutinised in an impartial manner before reaching the ultimate decision-makers. One way of doing this is by providing for a “fresh pair of eyes” to look at a case within the same agency. One agency without a formal separation of functions illustrates the extent to which agencies sometimes go out of their way in ensuring a maximum level of internal checks and balances:

As a counterbalance, the competition agency’s procedure foresees a high number of checks and balances, guaranteeing the impartiality of the decision. Before sending out a statement of objections or a decision, there is a high amount of consultation which the case-handling team must go through, such as the policy and scrutiny units and the legal department. In complex cases, also an internal “devil’s advocate” panel may be called upon to review the case. In addition, the parties’ rights of defence and right to be heard are safeguarded during the procedure by a special officer whose position has been created for that specific purpose and who works independently from the competition services. Before issuing a final decision, the competition agency moreover has to consult a special committee composed of competition law experts. Finally, it goes without saying that an appeal before the competent courts is possible against our decisions.

In addition, it should not go unnoticed that those that have introduced a strict separation of functions recognize that this decision leads to certain costs in terms of effective enforcement. The following arguments put forward by two different agencies demonstrate well the advantages and disadvantages that may be encountered:

__1.__ Each body can focus on its particular mandate, allowing for the development of focussed expertise. By keeping the investigative and prosecutorial functions separate, lawyers in the department of justice are able to focus on and develop expertise in judicial concerns including adjudication, while investigators are able to focus on and develop expertise in furthering investigations as well as uncovering and analyzing evidence.

The national prosecutor's department is required to uphold and protect the public interest in the administration of justice. This brings objective and dispassionate assessments of the facts presented for their review by investigators and ensures the objectivity and the integrity of the prosecutorial process.

By exchanging views and opinions at the investigative and prosecutorial stages, investigators and prosecutors are provided with a more strategic and fulsome approach to legal and investigative issues.

However, the disadvantages of having two separate bodies, absent corrective measures, include:

The possible break down in the communications and information flow as outside parties may speak to only one authority on a day-to-day basis.

The potential for the investigation to be slowed down due to one body becoming more knowledgeable on the matter and needing to update the other, and due to the necessary review and comment of the other's work product.

The coordination of expectations, priorities and schedules between agencies may at times be demanding.

***2.** Traditionally, the agency's cartel unit split the investigation and prosecution of cartel cases into two distinct phases, an investigation phase and a post-investigation phase. First, specialist investigatory resources conducted the initial investigation of allegations of cartel behaviour. Once the investigation was deemed to have been completed, the case was handed over to a case officer (usually a lawyer, sometimes an economist or generalist) for assessment and where appropriate enforcement action. Arguably, this structure has suffered from certain draw-backs, namely:*

- *issues of consistency with overall strategic approach;*
- *risk of conflicts between the primary focus of the investigation and the subsequent approach of the case handler (potentially leading to the need for significant further investigation in the 'post-investigation' phase);*
- *lack of supervision of the progress of the investigation by lawyers or economists with a better overall understanding of what is required for successful enforcement action (in the sense of the issuing of an infringement decision and the successful defence of the case on appeal);*
- *inefficiencies and delays caused by the handing over of a case from investigation to post-investigation phase; and*
- *lack of clear overall ownership/responsibility, i.e. the structure had the potential to give rise to disputes between investigators and case officers, especially when things went wrong.*

We are currently in the process of implementing structural changes to address these issues. Going forward, case officers will be in charge of an investigation from start to

finish. This will allow those with responsibility for drafting the statement of objections and ultimately the infringement decision to shape the case during the investigation with a clear forward look toward ultimate enforcement action. That said we consider that it is essential to maintain a skilled body of specialist investigators who have an appropriate degree of autonomy in which to exercise their skills.

c) Cooperating with other Bodies

Nowhere is the variety between agencies wider than when it comes to the circle of other governmental bodies with whom they cooperate. Many factors will influence an agency's choice – or obligation – to rely on such external public services. In view of this diversity, it is submitted that it is not advisable to seek to draw any clear-cut conclusions out of the examples at hand. Also, the nature and the level of detail available on the individual arrangements does not put the Working Group in a position to speculate about their practicality and efficiency.

However, on the whole, the agencies concerned welcome the merits associated with outsourcing. In particular, developing protocols of cooperation with other bodies offers the agency a greater degree of flexibility in terms of its own resources. It is therefore one popular way of dealing with the typical peaks and troughs that often characterise cartel enforcement. In addition, the protocols of cooperation with certain specialists may give an agency access to expert knowledge which may be crucial to enforcement and advocacy.

On the other hand, agencies also acknowledge that reliance on external assistance may raise issues both of understanding of competition law and procedure, and of confidentiality and ethical standards. The latter issue may pose a particular problem where competition agencies rely on private contractors to address certain needs. However, it is assumed that generally speaking, competition agencies will rely on assistance from the private sector in cartel enforcement only as a last resort, that is when no equally effective assistance from other governmental bodies is readily available.

With these caveats, agencies' responses to the questionnaire may still offer a flavour of existing protocols of cooperation that have been developed for the detection or investigation of cartels in one or the other jurisdiction.

Detection

For the detection of cartel behaviour, many agencies rely on information that other governmental departments gather as part of their normal work. Such cooperation for information gathering may be particularly intense with authorities involved in public tendering procedures…,

__1.__ The competition agency has worked with public contracting agencies in an effort to educate them about the dangers of bid rigging and to assist them in spotting suspicious behaviour.

… but also encompasses other agencies of government:

***2.** The competition agency has increased its outreach efforts with many governmental agencies by giving speeches to the agencies and sending them newsletters about antitrust prosecutions, which has increased the number of complaints from the agencies.*

***3.** The competition agency has worked with criminal investigative agents from other governmental agencies in addition to the national police, including the ministries of agriculture, defence, transportation and environment as well as the national post office, when the subject matter under investigation is within the jurisdiction of such agencies. When a governmental agency is a victim of the cartel, it is often beneficial to work with agents from that victim agency because they have knowledge of the programs affected by the violation at issue.*

Searches / Inspections

A number of agencies make use of the police to carry out on-site searches and raids. Apart from the case of IT specialists (see below), the tasks of police officers can range from simply facilitating entry for the investigators from the competition agency, to conducting the search themselves and providing expert surveillance or search techniques. Five agencies make the following comments:

***1.** Criminal investigatory agencies, such as the national police, often assist with cartel investigations by conducting searches pursuant to court authorized search warrants, arranging and monitoring consensual taping of conversations, reviewing documents, analyzing handwriting samples, testifying before the grand jury, and interviewing witnesses in voluntary interviews. [...] When an investigative agency assists the competition agency, the latter retains responsibility for leading the investigation. Sometimes the competition agency seeks out the involvement of agents by requesting investigative assistance from the head of the agency, if particular expertise or assistance with particular tasks is desired. Other times, agents may uncover cartel violations in the process of investigating other crimes, and request that the competition agency take over the investigation, with continued assistance from the referring agents. Also, as noted above, some of the competition agency's field offices employ police detectives who are routinely assigned to investigations within the office to which they are seconded.*

***2.** With regard to criminal cartel offences, both the competition agency and a special police unit have powers to investigate and prosecute the offence. There is the possibility that the agency conducts the early stages of the investigation and then hands over the matter to that police unit for completion of the investigation and prosecution. Alternatively, the police unit may deal with all stages of the case, including the initial investigation. However, to date no such prosecutions have occurred. The agency has agreed a Memorandum of Understanding with the special police unit which records the basis on which they will co-operate to investigate and/or prosecute individuals in respect of the cartel offence where serious or complex fraud is suspected. The factors that the special police unit take into account in defining a serious or complex fraud*

include cases where the sum at risk is estimated to exceed a certain financial threshold, cases that are likely to give rise to national publicity and widespread public concern (for example, those involving public bodies) and cases where legal, accountancy and investigative skills need to be brought together.

3. *The competition agency has access to an information database used by the national police forces which provides investigators a greater understanding of individuals under investigation. The agency will also usually seek the assistance of a special policy squad in matters necessitating the use of a wiretap. Finally, in circumstances where a premise is to be searched, and where warranted, the Bureau may seek the assistance of the local or national police forces.*

4. *In case of searches the competition agency has the possibility to ask for the assistance of the police. The purpose of the assistance is to get over a possible resistance. The police does not though take part in the actual searching, it only secures the area.*

5. *The competition agency has the powers of search and summons. When an investigator is conducting a search operation he/she may be accompanied and assisted by a police officer, especially to overcome resistance to entry and search by using as much force as is reasonably required, including breaking a door or window of the premises. Before using force, a police officer must audibly demand admission and must announce the purpose of the entry, unless it's reasonable to believe that doing so may induce someone to destroy documents that is the object of the search. The investigator of the competition agency still leads the search operation.*

3. Specific Organisational Requirements for an Effective Fight against Cartels

a) Mastering a Leniency Programme

Requirement of central recording of leniency applications

An increasing number of agencies operate leniency programmes (sometimes also called immunity or amnesty programmes) as a key tool to detect cartel infringements[9]. The offer of full immunity to only the first undertaking coming forward under the programme is central to any Leniency programme, thus creating a clear incentive for companies to do so. When introducing a Leniency programme, it is therefore essential for the concerned agency to be able exactly to determine the timing of any requests for leniency.

In order to do so, agencies which operate such programmes have to set up a reliable (time-) registry of receipt of leniency applications. In essence, there are two practical ways of organising such a registry. The first alternative is to register leniency applications centrally, that is giving only one contact point through which all applications have to be channelled. Such a contact point may either be a dedicated phone or fax number, or be open to other means of communication as well. Alternatively, especially agencies operating in a jurisdiction covering a large geographic territory may find it useful to offer prospective applicants various contact points. Such a decentralised receipt and administration of leniency applications is nowadays technically feasible, but does require a centralised decision-making authority to ensure that leniency policy and procedure remain consistent throughout the whole territory.

Of the 19 agencies surveyed for this report, 13 have leniency programmes in place. Some of the reporting agencies opted to centralise the treatment of leniency applications within a dedicated team or unit, whereas other agencies allow leniency applications to be treated by several divisions or field offices.

Requirement of coherence and consistency control

An efficient leniency programme also requires that the greatest possible degree of transparency exists as to the conditions that need to be met in order to benefit from the programme. On an organisational level, this means that agencies with leniency programmes have to install the necessary safeguards to ensure coherence and consistency in the treatment of leniency applications.

Centralising the treatment of all leniency applications in a dedicated team or division which is also responsible for the investigation and prosecution of cartels in general is one option

[9] See for instance OECD, *Report on Leniency Programmes to Fight Hard-Core Cartels,* Paris 2002; Scott D. Hammond, US Department of Justice, *Cornerstones of an Effective Leniency Program,* Sydney 2004 (http://www.usdoj.gov/atr/public/speeches/206611.htm).

favoured by a number of respondents. This is particularly true since the successful administration of a leniency programme requires judgement calls to be made. First hand experience in cartel investigations and prosecutions assists in ensuring that the calls are made in a fair and consistent manner.

The experience of other respondents also provides useful insights in how to ensure such consistency while taking advantage of other organisational solutions. This is particularly of interest where for example the geographical size of the jurisdiction does not allow for leniency applications to be treated exclusively by one unit or where the jurisdiction operates on sector-specific division of antitrust work as opposed to an instrument-specific division.

In cases where several divisions can apply the leniency programme, consistency is generally obtained by creating a central "support unit" which provides assistance to those divisions in the treatment of leniency applications.

Sometimes good results may be obtained through relatively small but intelligent solutions. One agency for instance has invested a lot of efforts to ensure a coherent and consistent application of its leniency programme (and anti-cartel legislation in general), especially in view of the fact that it works on the basis of a clear separation between the investigative and prosecutorial phases: one of the solutions developed to achieve the desired level of "enforcement rigour" is a standard published leniency agreement or letter which clarifies for the potential applicants and agency officials alike the exact conditions on which immunity can be granted. The agency reports that this has proven highly successful in ensuring that standardised language is used by all instances involved in dealing with a leniency application, which is a critical element to the success and effectiveness of the leniency programme.

b) Evidence Gathering, esp. Searches and "Raids"

The use of formal powers to gather evidence, such as in particular unannounced searches or "raids", is of course not exclusive to the investigation of cartels. However, due to the special characteristics of most anti-cartel proceedings, agencies have to rely more heavily on the quality of evidence discovered through their own devices, rather than on material submitted by the parties.

The organisation and carrying out of searches is generally considered as a science of its own, involving not only a high amount of specific procedures and paperwork (warrants, mandates, judicial authorisations, etc…) but also practical expertise regarding the constitution of teams, coordination with other agencies, prevention of and dealing with obstruction, destruction of evidence, etc… It is generally recognised that these tasks require specialist skills. As mentioned above, those issues are discussed in more detail in the *ICN Anti-Cartel Enforcement Manual*, the first chapters of which are being drawn up in parallel with this report.

Although none of the respondents have separate institutional structures dealing solely with the organisation of searches for the detection of cartels, there is however a *de facto* specialisation in view of the fact that most reporting agencies have centralised their anti-cartel enforcement efforts, including the organisation of searches, in specialised or dedicated divisions.

A recurrent observation made by respondents is that in the absence of a specialised cartel unit, at least a cross-sector know-how group needs to be created to provide specialist assistance on the various aspects of cartel investigations:

c) IT Forensics

Requirement for specific IT-forensics expertise to detect evidence of cartel behaviour

Virtually all agencies agree that the success or failure of their on-the-spot investigations may in certain cases hinge crucially on the availability of **investigators with expert IT skills**. This consensus reflects the observation that evidence written on a piece of paper, ideally with a hotel logo printed on top of the page, has become increasingly rare, and that evidence is increasingly stored electronically. What is more, every single investigator may not only be called upon to search computers, hand held and storage devices such as USB-sticks or memory cards, but is with increasing frequency confronted with password protected communication or storage systems, or even systems protected by encryption techniques. Hence computer-illiteracy can seriously impede the success of searches or inspections.

> *It is considered of great importance that inspection teams comprise also specialist IT people who are able to search extensively company-internal networks and servers. At the same time, it is re-assuring to the companies under investigation that no other than IT specialists access their server, applying searching techniques. The reality is that the high complexity of many IT applications requires a certain expertise in order to be thoroughly checked. Regular inspectors may not be able to retrieve deleted documents or certain formulas attached to data sheets for instance.*

At the same time, it is reassuring to the companies under investigation that no other than IT specialists access their server, applying searching techniques. It is also the best safeguard against claims by companies that the evidence would have been *"tampered with during the search".*

For agencies, this is a relatively new phenomenon. It is safe to say that many of them are still experimenting with the best ways to build up and nurture this scarce resource. Responses to the questionnaire reveal that some agencies are making long-term investments by building up dedicated in-house IT investigation units, whereas others outsource this task and rely on external consultants, even though in some cases only on a "seasonal basis", during periods of high work load. Especially for smaller agencies, outsourcing may be the only viable option since the considerable investment into a qualified team of IT-trained inspectors may not be warranted by the small number of cases where such skills are required. ***Box 5*** illustrates some of the issues that agencies have to consider when relying on external IT resources.

To some extent, the need for IT forensics know-how can be met by providing basic IT forensic training to "regular" officials involved in searches. A number of respondents have developed such training on a regular basis. There are however divergent views as to whether agencies should build up their IT-skills in-house, or whether it is more efficient to rely on external providers. The following statements from four different agencies reflect the former perspective:

Box 5: Outsourcing IT Resources

It is envisaged that the cartel unit's demand for IT forensic expert assistance will be very much characterised by peaks and troughs, i.e. that it will be directly related to the carrying out of raids and the post-raid handling of data obtained during the raids. In times of relative 'calm' the full-time member of staff is at risk of being under-utilised. At times of raid activity, the resource may be insufficient to meet the cartel unit's IT forensic requirements. However, the role of a full-time IT forensics member of staff has been very beneficial in the setting up of the cartel unit's IT forensics procedures, providing training on IT forensic matters to the branch and the acquisition of appropriate equipment of the cartel unit to enable it to locate, capture and store electronic data on raids (or in the context of leniency applications) effective and efficiently.

As a result of a recent change in the law, the competition agency is now allowed to use the services of outside experts such as IT forensic experts during on-site investigations. The cartel unit has to date not had to rely on such additional external IT forensics resources but has contacted possible providers of such assistance and discussed the provision of such assistance with these providers. The cartel unit has further considered certain practical problems the reliance of such external assistance may give rise to, e.g. knowledge of applicable procedural rights, conflicts of interests and confidentiality of the raids:

Knowledge of investigation procedures

The cartel unit's IT forensic expert has received detailed training on the powers of investigation of competition law matters and on the importance of establishing a detailed 'audit trail' of evidence collected to ensure that the evidence can be relied on by the competition agency and before court. In practice, the key stages of evidence gathering and retention have been identified as follows:

- the identification of the electronic evidence;
- the acquisition of the electronic evidence (e.g. by imaging the hard drive);
- the verification of the accuracy of the electronic copy taken; and
- the secure storing of the electronic evidence.

During a raid all IT forensic experts (internal and external) report directly to the designated team leader for the relevant site. Where external IT forensics experts are used, pre-raid briefings and ongoing supervision are of particular importance.

Conflicts of interests and confidentiality

When buying in external IT forensics assistance the issues of conflicts of interests and confidentiality must be considered carefully. There can, for example, be problems where it is undesirable to disclose details of the raid to the external expert before the raid while it is important to establish that the relevant external expert has no conflict of interest. One possible way of addressing this issue is to adopt a no-names approach whereby the competition authority does not reveal the target(s) identity but only identifies the general sector of the investigation, breaking the sector further down into sub-sectors to the extent required (but stopping short of providing information which would be too specific and accidental or other disclosure of which might jeopardise the integrity of the investigation).

> ***1.** The competition agency's forensic IT unit provides the cartel unit and the rest of the agency with forensic expertise and the capability to collect and analyse electronic data. The forensic IT unit was established to provide a uniform and coordinated agency approach to handling and processing all electronic evidence. The forensic IT unit's mandate includes: participating in searches and seizures of electronic records; assisting in acquiring, reviewing and analyzing electronic records; maintaining evidentiary standards for electronic records acquired; maintaining a laboratory to capture, process and analyze electronic records; maintaining expertise in a quickly evolving specialty; and, training agency officers to facilitate analysis of electronic records.*
>
> ***2.** Within the competition agency, a basic forensic IT training is given as part of the "training for inspectors" to all members of staff who are called to participate in on-the-site searches. In addition, there are members of the competition agency's IT-department who almost always accompany all inspection teams.*
>
> ***3.** The agency's cartels unit operates an internal computer forensic unit run by one full time member of staff. This facility is independent in terms of operating its own specialist hardware, software and forensic procedures. During periods of high work load, additional computer forensic experts are hired on a short term contract basis. Members of the cartels unit have received basic training on this topic, supplied internally. Assistance is also offered to other branches within the agency on an informal basis.*
>
> ***4.** Forensic information technology is only used by the cartels unit. One of its investigators took part on a specialized training for officers using a special program. The personnel of the competition agency's IT section is also providing help for the cartel units. So far these arrangements proved to be enough. Apart from that, the competition agency is trying to get in contact with external specialists, for the case of special IT problems.*

On the other hand, there are agencies which draw, at least for the time being, on the expertise of the outside IT experts. This can be done by either relying on IT specialists of other departments of government, and especially the general enforcement authorities, as with the following three agencies …

> ***1.** The competition agency itself does not have the capability of conducting electronic or computer searches during the execution of search warrants, but the national police and other criminal investigative agencies in the jurisdiction do have that expertise and provide that type of investigatory assistance for the agency.*
>
> ***2.** The competition agency generally avails itself of assistance provided by police IT experts in order to seize the relevant evidence. The evaluation, however, is carried out with the assistance of special evaluation programmes and the agency's own IT experts within the special cartel unit. Where it does not have the necessary software, other agencies such as the national police or informatics offices are asked to provide assistance.*

> ***3.*** *Currently the competition authority is training case officers to be IT specialists. In the interlude the agency is reliant on the IT forensics assets within the national police.*

… or by making recourse to external assistance from the private sector.

> ***4.*** *The competition agency normally out sources IT-based evidence searches. However, the search would still be conducted in the presence of the lead investigator, who would be responsible to identify specific key documents contained in IT based network. Occasionally, the competition agency has made use of internal IT personnel to assist with the above process. None of the internal IT personnel are active team members on case teams, neither do they have legal or economic backgrounds, therefore clear guidance from the lead investigators are required during such process.*

Interesting to note is that IT expertise can sometimes also be provided in the form of software tools: as one agency reports, specialised databases and software tools allow for "regular" case handlers to search for key data contained in electronic data available to the agency. As a consequence, at least part of the electronic data seized during a raid can be processed by the an agency's own personnel.

One final point to make in this context is that the importance of IT expertise is not limited to searching electronic data during the execution of search warrants or the processing of electronic evidence found. Given the complexity of electronic data storage, IT expertise may also be required in drafting and negotiating document subpoenas for the production of electronic data, in order to ensure that the request is adequately formulated and to verify that the subpoena recipient has adequately searched for and produces the electronic data called for by the subpoena.

d) Witness Statement Taking / Interview Techniques

Another tool used in the detection of cartel infringements is to interview or interrogate suspected cartelists or other individuals concerned. A successful interview should lead to a maximum amount of information being obtained while disclosing as little as possible. Countries that typically rely on interviews as part of their evidence gathering process will agree that the success of an interview will largely depend on the experience and training of the personnel conducting the interview.

The ultimate objective is to use the information obtained through interviews in the course of a cartel prosecution. Depending on the criminal, civil or administrative nature of proceedings concerned, particular skills may be required to achieve that.

Some agencies report that they would typically draw upon outside expertise to conduct interviews, for instance from the police. One particular agency highlights that its cartel division is benefiting from the long-term secondment of a senior investigator with extensive witness statement-taking experience from the national police unit specialising in the investigation of white collar crime. In the competition agency, the secondee is engaged both in conducting interviews for on-going investigations, and in training the agency staff.

In addition, the same agency has decided to permanently employ two former investigators from that unit.

Another agency reports that it has recently acquired the possibility to conduct interviews, but that its powers to conduct forced interviews are limited to the framework of on-site searches, both in terms of the subject-matter (documents seized during the search) and time. Other interviews can be conducted with the consensus of the target.

4. Conclusions

This chapter relates to a fundamental building block for any effective anti-cartel regime: the organisational arrangements that agencies can make in order to be well set up internally for the fight against cartels.

An increasing number of competition agencies have set up special cartel branches. The motivation to do so was to build up centres of excellence with respect to the expertise and skills relevant to the operation of a leniency programme and the organisation of searches and raids. Increasingly, agencies' armouries of investigatory measures also include such advanced powers as the interviewing of witnesses, IT-forensics and in some instances even covert surveillance. It seems fair to say that this specialisation is particularly prominent among those agencies which have to bring criminal charges against cartel conspiracies.

On the whole, agencies' experiences with such cartel branches seem to have been very positive, although it is recognised that small agencies may find it difficult to afford the specialisation that the setting up of such branches inevitably entails.

Yet some agencies argue that an intimate knowledge of the sectors under investigation is likely to substantially increase the likelihood of detecting a cartel, and of the quality of investigations. For these reasons, those agencies have essentially organised themselves along sectoral lines. However, since some of those agencies recognise the specific requirements of the fight against cartels, they have supplemented their sectoral structure with smaller cartel support units.

Other issues on which the practices of jurisdictions differ relate to the right balance between, on the one hand, allowing the agency to fulfil its enforcement mission effectively and, on the other, the respect of principles of due process and impartiality. This is clearly borne out by the different approaches to the pros and cons of leaving the investigative stage of a cartel case in the same hands as the subsequent prosecutorial stage. The responses received demonstrate that there are various ways of striking this balance.

One of the most striking findings of our survey was the variety of ways in which agencies rely on outside assistance in their fight against cartels. Many agencies try to carry out all tasks, including the provision of IT-services, internally. One has to recognise,

however, that especially for smaller agencies the unavoidable peaks and troughs of cartel investigations can make an efficient allocation of resources difficult. For these and other reasons, a number of agencies outsource some of the tasks associated with cartel investigations. The possible scope for outsourcing ranges from asking police detectives to carry out searches, to relying on private contractors for the provision of expert IT skills. In such scenarios, issues of confidentiality and of potential conflicts of interest merit particular attention.

Part III
Effective Penalties

PART III: EFFECTIVE PENALTIES

This part will explore ways of effectively penalizing cartel conduct in delineating both the general notion and the current practice of punishing cartels in the 19 jurisdictions which participated in this project: Australia, Brazil, Canada, European Union, France, Germany, Hungary, Ireland, Japan, Mexico, Pakistan, Russia, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States of America and Venezuela.

The scope of the project is limited to public enforcement, i.e. administrative and criminal sanctions against enterprises and natural persons, designated as "penalty" or "sanction" throughout this report. Both private enforcement and leniency issues – although they are a matter of importance when it comes to sanctioning cartel conduct - were not dealt with since separate projects focussing on these topics are or will be under consideration in the future. All questions relating to enforcement procedures and institutions, including those referring to procedural penalties and periodic penalty payments have not been studied either, given that they also form part of different projects.

In a first section, the question of what might constitute an effective sanction will be discussed building on research already undertaken in this area. Section 2 will describe the ways in which cartels are punished under existing competition laws in highlighting both the legislative and administrative framework as well as recent practical experience. Finally, the last section will give a brief account of national studies relating to effective penalties and the self-assessment of the national competition authorities of their respective sanctioning systems.

1. The Notion of "Effective Penalties"

According to the *New Oxford Dictionary of English*, something is **effective** if it is successful in producing a desired or intended result. Competition law serves the goal of safeguarding free competition all over the world, even though there might be slight differences in the ultimate policies pursued (with a stress on e.g. the public welfare, the protection of consumers, small businesses, and/or entrepreneurial freedom). In examining more specifically the purpose of penalizing cartel conduct, the two main theories of punishment come to mind. Pursuant to these theories, the legislator might either aim at "paying back the offender" or at deterring future offences in using the instrument of **penalties**.[10]

The **retributive theory** stresses the principle of proportionality ("an eye for an eye") and the main criteria in setting the sentence would be culpability and harm. The **utilitarian theory**, on the other hand, focuses on both special deterrence (preventing recidivism of individual offenders) and general deterrence (setting an example to other potential offenders). An economic approach to deterrence assumes that in the area of competition law, potential offenders conduct a cost-benefit analysis in order to see if the benefit is worth taking the

[10] Cf. the summary and the citations given by Patricia Hanh Rosochowicz: *The Appropriateness of Criminal Sanctions in the Enforcement of Competition Law,* E.C.L.R. 2004, pp.752-757.

risk of being caught and punished. From this point of view, an effective penalty is one that takes into account the financial gains perpetrated by the offence as well as the probability of detection.

a) Deterrence as a Primary Objective

According to the results of this survey, the objective of deterrence clearly outweighs the need to "pay back" the offender in the field of cartel sanctions. This finding reinstates the outcome of the research already undertaken by the OECD and the Global Forum on competition[11] in the area of effective penalties.[12]

The well-known *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, adopted on 25 March 1998 includes the following recommendation I.A.1 to Governments of Member countries:

> *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 (...)*

The question of what might constitute an effective deterrent sanction has been spelled out in more detail in the Report on the Nature and Impact of Hard Core Cartels and the Sanctions Under National Competition Laws issued by the Competition Committee in 2002. This report examines inter alia the sanctions available under national cartel law and their optimal use for deterring cartel activity.

---

[11] The existing OECD publications include the *1998 Hard Core Cartel Recommendation* (http://www.oecd.org/dataoecd/39/4/2350130.pdf), the *1st Progress Report of 2000 on Hard Core Cartels* (http://www.oecd.org/dataoecd/39/63/2752129.pdf), the *Policy Brief on hard core cartels - Harm and effective sanctions* (http://www.oecd.org/dataoecd/30/10/2754996.pdf), the *Report on the Nature and Impact of Hard core cartels and Sanctions against cartels under national competition laws* published in 2002 (http://www.oecd.org/dataoecd/41/44/1841891.pdf), the 2003 publication *Hard core cartels: Recent Progress and challenges ahead*, the 2005 report on *Cartels: Sanctions against Individuals* (DAF/COMP(2004)39; the Global Forum has dealt with the issue of effective penalties on its Second Meeting, see the overview given in the *2004 report* available at http://www.oecd.org/dataoecd/13/42/27892500.pdf, pp. 71 et sqq.

[12] Furthermore, the question of effective penalties and deterrence has been the dealt with both in other official documents and in recent academic contributions, which for instance include the following publications: Government of New Zealand (1998). *Penalties, remedies and court processes under The Commerce Act 1986,* (Wellington: Ministry of Commerce); Office of Fair Trading, United Kingdom: *Proposed criminalisation of cartels in the UK* (Nov 2001); John M. Connor and Yuliya Bolotova: *Cartel Overcharges: Survey and Meta-Analysis,* March 10 2005; Gerhard Dannecker, Oswald Jansen: *Competition Law Sanctioning in the European Union,* Kluwer Law International, 2004; John M. Connor: *International Price Fixing: Resurgence and Deterrence,* October 2003 version; John M. Connor: *Global Price-Fixing: Our Customers Are The Enemy.* Kluwer Academic, 2001; Margaret C. Levenstein and Valerie Y. Suslow: *What Determines Cartel Success?,* February 10, 2002; Margaret C. Levenstein, Valerie Y. Suslow and Lynda J. Oswald: *International Price-Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies,* April 3, 2003; Simon J. Evenett , Margaret C. Levenstein and Valerie Y. Suslow: *International Cartel Enforcement: Lessons from the 1990s;* April 3, 2001.

In shaping the idea of an effective sanction the more general statements made in the OECD report were of particular interest for this project. The participating agencies were therefore asked to assess two OECD statements relating to the purpose of sanctions and effective ways to pursue this objective.

It is noteworthy that there was unanimous approval of the following statement: *"The principal purpose of sanctions in cartel cases is deterrence. (….) Sanctions have another, related purpose in the cartel context – that of providing an incentive for cartel participants to defect from the secret agreement and provide information to the investigators."*

One agency pointed out that in addition to deterrence, the fines for cartels under its national law serve the further purposes of retribution and absorption of the financial benefit obtained from the offence. Another agency explained that in its current system, the purpose of sanctions is deterrence and has nothing to do with providing an incentive for cartel participants to defect from the secret agreement and provide information to the investigators. However, a bill introducing a leniency program is in the making.

Nevertheless, all 19 agencies generally agreed that the principal purpose of sanctions in cartel cases is deterrence, supplemented by the concomitant phenomenon of encouraging whistle-blowing in jurisdictions where there is a leniency programme. The benchmark agreed upon to judge a penalty effective or ineffective is thus foremost its suitability to deter cartel activity.

b) The Ideal Way to Calculate an Effective Deterrent

Taking it one step further, it is therefore interesting to outline the shape an effective deterrent might take. Here there is another interesting statement in the OECD-report, rephrasing a formula commonly cited in economic publications, stating that *"an effective penalty equals the expected gains from the cartel times the probability of cartel detection":*

> *An effective deterrent is one that promises, on average, to take away the financial gains that otherwise accrue to the cartel members. In the case of fines against enterprises this would mean that both the expected gains from the cartel and the probability that the cartel will be detected have to be taken into account.*

Apparently, this statement gathered a lot of support as well: 15 of the 17 agencies who answered this question expressed their agreement and just two disagreed.

One dissenting agency did not state its reasons. The other one stated that its legislature had abandoned the idea of taking the company's pecuniary gain as the main criterion for determining the level of the penalty because this element was **too difficult to prove empirically.** Moreover, it pointed out that the pecuniary gain might be non-existent and cited the example of a bid-rigging cartel, in which the company that obtained the award achieved a pecuniary gain while the other participants did not.

Two agencies rallying behind the OECD-statement also pointed out the practical difficulties in calculating the gains. In one agency's jurisdiction, the authorities have therefore not been applying the financial gains criteria in calculating the fines, notwithstanding the law. The

other agency encountered difficulties in imposing fines related to additional proceeds that will stand up in court, and therefore advocates that the present way of calculating the maximum fine based on multiples of illegal gains be changed to a turnover based approach.

Two agencies remained undecided. One of them explained that from their point of view it is problematic to link the level of fines imposed to the possible financial gains of a company or indeed the welfare loss to an economy as a whole as the quantification of such gains/losses is notoriously difficult. The agency stressed that it is of course true that the potential level of fines should, on average, make cartel activity financially unattractive. In addition to the level of the possible fine, **damage to reputation** may also add to cartel activity becoming economically unattractive. There is however the argument that if companies also factor into their risk/reward assessment of cartel activities the probability of getting caught, fines would need to be substantially higher than the actual gain obtained from the cartel activity. For this reason it is this agency's position that the additional **availability of criminal sanctions** (including imprisonment) assists to create effective deterrence.

One of the agencies agreeing to the OECD-statement also alluded to the fact that the press coverage of the sanctioning proceedings may also constitute a very effective penalty. Under its national law, **the duty of publishing the decision in the Official Gazette** and in any other journals may be imposed on the undertakings. This can seriously harm the good name of the undertakings involved and therefore might act as a very strong deterrent.

Another agency agreeing in principle mentioned that the increase of fines for deterrence should not be arithmetically linked solely to the financial gains which could not be determined with accuracy. The effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, should be taken account of in setting the fine at a level which ensures that it has sufficient deterrent effect. However, the **principle of equal punishment** for the same conduct may, if the circumstances so warrant, lead to different fines being imposed on the undertakings concerned without this differentiation being governed by arithmetic calculation.

Another agency pointed out that the idea of considering the probability of detecting cartels in calculating the fine may be appropriate from the viewpoint of ensuring deterrence. But it might violate the **principle that the balance between the offence and the punishment should be well balanced** if the amount of surcharge becomes too high.

One the other hand, it was pointed out that even though agencies complained of difficulties in calculating gains, there have been many studies of the price effects of cartels. Most of these studies were prepared by experts in treble damages litigation.[13]

To sum it up in a nutshell, even though the calculation method mentioned in the above statement is widely considered to be correct, there are some doubts as to its practicability (difficulties of calculation and proof) and some concerns about the companies' rights being impaired if other criteria are completely disregarded in setting the fines. Furthermore, attention is drawn to additional ways of achieving deterrence (press coverage, criminal sanctions including imprisonment).

[13] Cf. section 3 below for further details.

2. Penalties under Existing Competition Laws

These doubts relating to the existence of an ideally deterrent sanction are reinforced when looking at the different types of sanctions proposed by and used in the jurisdictions participating in this survey. Even though cartels are considered punishable around the world, the formula cited above (illegal gains * probability of detection) is rarely used to fine the companies and even less to punish the individuals involved. However, even if the secret recipe is missing, one cannot help but notice a wide variety of ingredients to choose from when looking at the penalties available under existing competition laws.[14]

a) Punishable Cartels

All but one of the respondents indicated that their **national law** allows for direct penalties for those engaged in impermissible cartels. One third of those surveyed even pointed out that they have specific penalties for hard core cartels. Given the geographic dispersion of the respondents, which includes authorities from all five continents, and their various historic and economic backgrounds, it is noteworthy that there is general agreement about impermissible cartels being punishable.

The **specific penalties** provided for hard core cartel activities include high fines and prison sentences. Furthermore, in some jurisdictions hard core cartels do not qualify for immunity from penalties granted to other, less severe cartel agreements under the same circumstances (e.g. if the companies involved in the cartel only have a very small combined share of the relevant market).

In some countries, just bid rigging cartels face specific penalties. One agency indicated that under its national law, bid rigging is the only cartel considered to be a criminal offence and punishable by imprisonment up to five years or a fine. Another agency pointed out that a bidder may be excluded from a public procurement tender if it infringed the ban on cartels as ruled by a definitive and executable decision. The foreclosure of a potential bidder is not compulsory; it is only a possibility, which depends on the decision of the tender announcer. According to the agency, practice shows that this provision can be a real obstacle for leniency applicants, as the possible fine is much less threatening for them than the potential prohibition from taking part in future tenders for the next 5 years.

The legislative and administrative framework all over the world therefore allows for sanctions against cartel conduct. However, in examining their deterrent effect, the question of the **enforcement** of the penalties available under national legislation is at least equally important.

The table below provides a quick overview of all the cases and penalties reported by the 18 participating countries disposing of cartel sanctions. The figures indicated will be discussed by and by in this summary in dealing with the different issues raised. Of course

[14] This survey focuses on the different forms a penalty might take (financial payments, imprisonment or other) and on whom it may be imposed (companies or individuals). General classifications or legal concepts governing the imposition of penalties remain largely out of consideration since they are integrated into differing national legal systems which need (and deserve) to be studied in depth to fully understand their respective features and implications.

these numbers do not necessarily paint the whole picture, given the difficulties of statistical assessment. There is, however, one observation that merits to be made right away: The level of enforcement activities seems to be very different from jurisdiction to jurisdiction. Six countries did not report any case at all for the three-year period examined, while the "spearhead" countries indicated up to 38 cases a year.

	Total		
Recent experience	**2001**	**2002**	**2003**
Penalty decisions in cartel cases	122	114	117
Cases terminated differently	112	87	44
Number of companies fined	179	145	174
Total amount of fines against companies	1.997.854.076,72	1.107.275.621,05	1.512.263.752,87
Average amount of fine per company	5.444.096,29	4.301.237,38	3.243.666,25
Number of individuals fined	51	330	63
Total amount of fines against individuals	5.857.085,91	8.746.641,84	4.773.596,49
Average amount of fine per person	74.410,42	156.403,20	149.319,35
Number of individuals imprisoned	21	11	30
Total length of imprisonment (in months)	296	214	507
Average length of imprisonment (in months)	14	19	31
Highest sanction imposed on a company	93.627.094,60	37.744.980,90	50.105.291,25
Highest fine imposed on an individual	275.624,08	1.540.678,36	254.636,67
Highest prison sentence imposed on an individual (in months)	63	120	44
Number of cases in which the total gain was estimated	4	5	5
Amount of total gain	2.130.819,40	2.531.202,24	3.926.327,81

Explanatory Note:

For the purpose of this report, the sums indicated in national currencies have been converted to US Dollars by using the foreign exchange rates indicated by the U.S. Federal Reserve, available at: http://www.federalreserve.gov/Releases/g5a/current/G5A.htm. Nevertheless, the fractions have been designated «the European way» with a «,» and in indicating steps of 1000 by a «.»

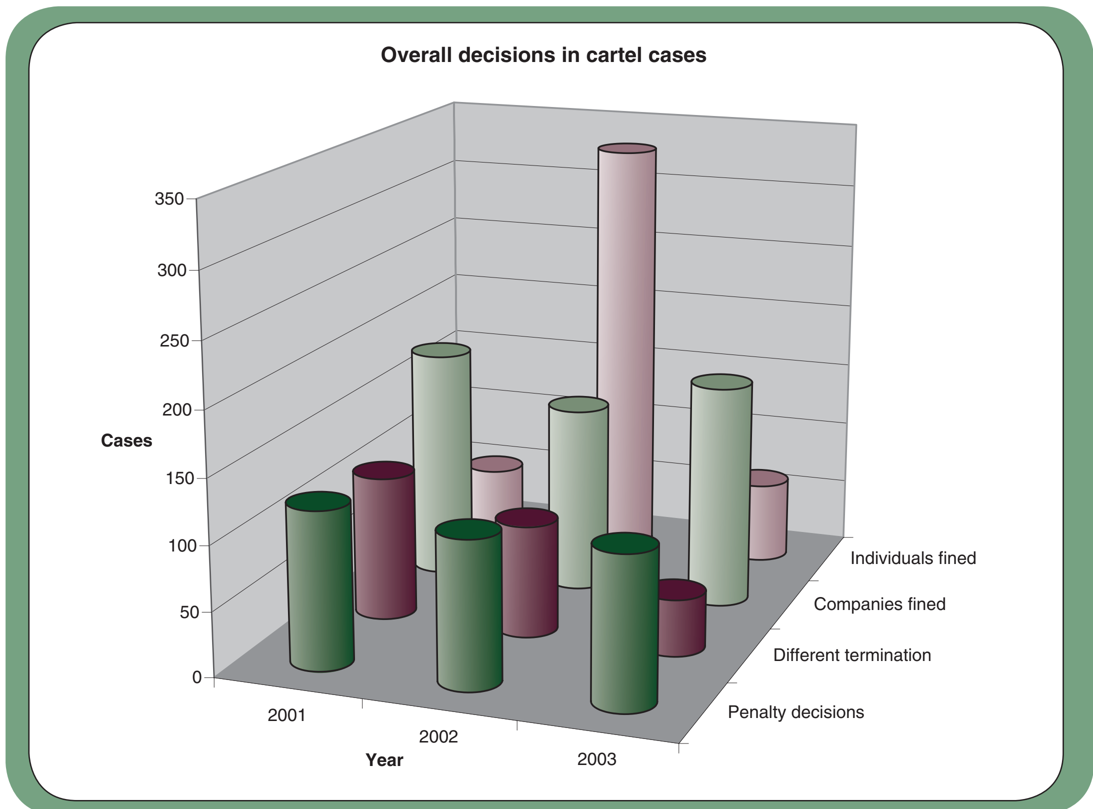
The highest sanctions indicated are an average composed of the highest sanctions indicated by all respondants.

In order to calculate an overall overview, the boxes left unanswered or indicating "n.a." etc. have been filled in with a "0".

The subsequent charts display

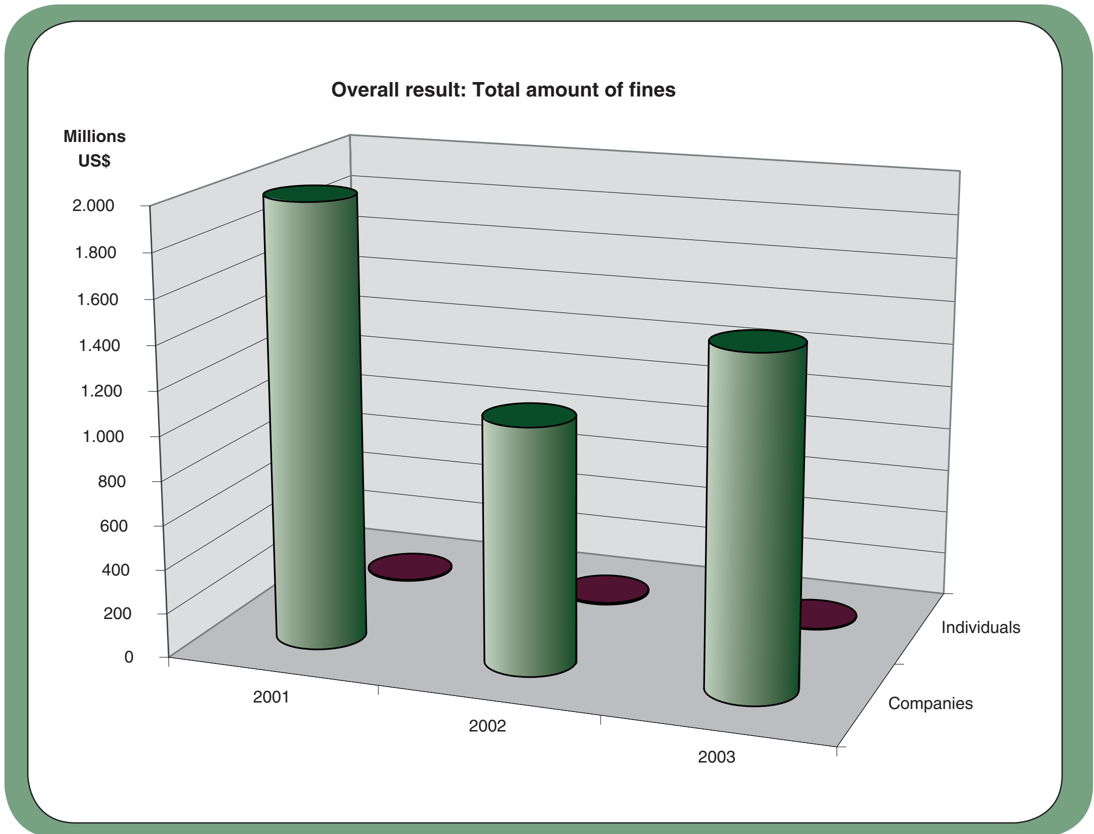
- the overall number of penalty decisions and the relative numbers of companies and individuals fined and
- the total amount of fines imposed on companies and individuals respectively by all respondents to the questionnaire.

There has been a very slight decrease in the number of cases reported, dropping from 122 in 2001 to 114 in 2002, but rising again to 117 in 2003. The number of companies fined also fell in 2002 from 179 to 145, but rose again in 2003, reaching 174. The number of sanctioned individuals went up in 2003 compared to 2001, with regard to both fines and prison sentences.



The total amount of fines imposed on companies dropped down quite impressively from 2001 to 2002, to almost a half. Nevertheless, it rose again in 2003, without attaining the level of the results of 2001. This might indicate that the fines were unusually high in 2001 and extraordinarily low in the consecutive years. The overall amount of fines against individuals decreased from 2001 to 2003, but represented an upswing in 2002. Compared to the fines against companies, their relatively small size makes a great visual impact.

NB: Please note the 3-dimensionality of the graph leads to a distorted illustration of the figures. For the correct figures please refer to table at page 56.



b) Fining Companies

The most widespread penalty provided for impermissible cartels are fines imposed on the participating companies.

Bearing in mind the OECD statements cited above, maximum fines are of particular interest in determining the deterrent effect the threat of punishment may unfold since they actually represent a worst-case scenario for the wrongdoer.

On the other hand, minimum fines seem to be considered as less important: More than half of the agencies surveyed stated that there is no minimum fine at all under their national law. Three countries have a minimum fine expressed in terms of a specific monetary amount and one has opted for an index-linked minimum fine related to the current minimum daily wage. The three remaining countries applying minimum fines have chosen a combination of either fixed or index-linked monetary amounts with a percentage of annual turnover or the absorption of illegal proceeds obtained from the cartel offence. The hesitant use of minimum fines can come as a surprise since these fines form the bar over which the offenders have to jump in any given case. One of the main reasons that was suggested for setting aside minimum fines – and their deterrent effect – is to allow more flexibility in situations where only a minimal penalty is justified.

As to maximum fines, seven countries have expressed their severest threat to cartels as a **percentage of annual turnover**, five countries have opted for a **specific monetary amount** and three have chosen a combination of the above methods.

Two other countries have the possibility to punish companies by imposing a fine up to a specific monetary amount or by recovering two or three times the **conspirator's benefit.** Alternatively, one regime also allows to recover twice the **victim's loss**. One country has chosen a maximum fine expressed as a percentage of gross sales value which may be replaced by an index-linked monetary amount in cases where it is not feasible to use the gross sales value. In any case the fine shall by no means be lower than the advantage obtained from the underlying infringement, if assessable.

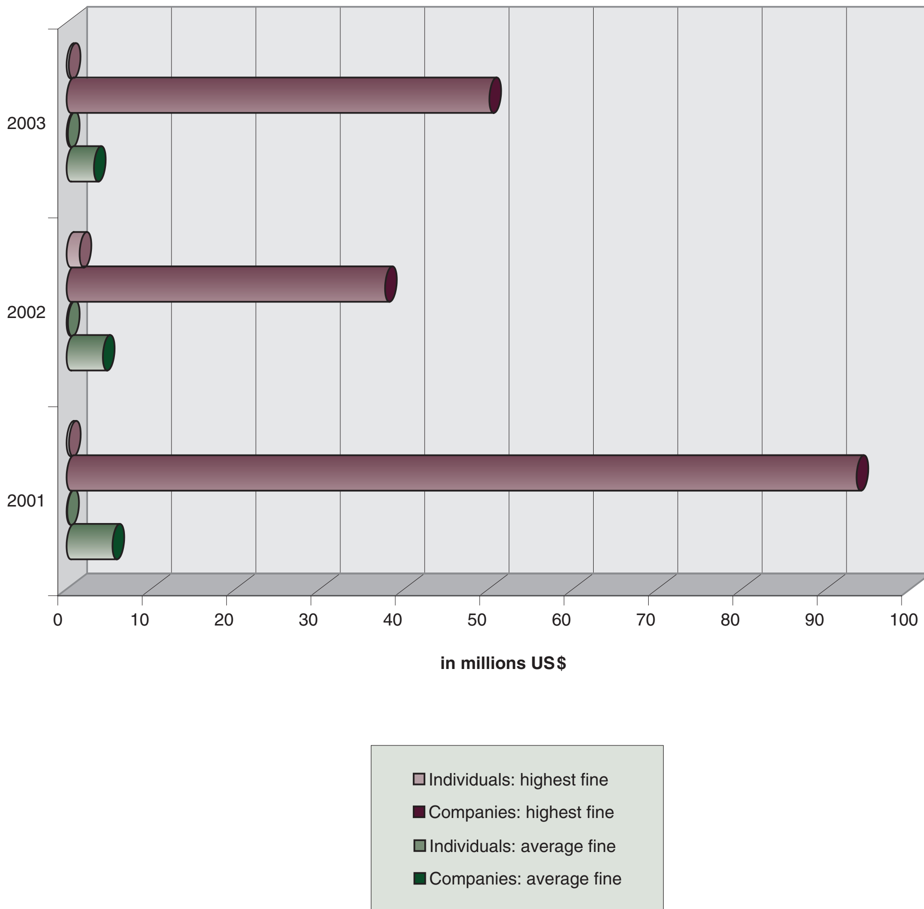
Yet another country has chosen an **index-linked monetary amount** as a maximum fine which may be doubled in case of recidivism. In particularly serious cases a fine can be imposed in the amount of up to 10 per cent of the annual sales achieved by the perpetrator in the last fiscal year or up to 10 per cent of the perpetrator's assets value.

Taking into consideration the broad agreement to the OECD statements cited above, it is noteworthy that none of the countries surveyed have chosen to completely rely on the threat of taking away the financial gains from the cartel by multiplying them by the probability of detection. Only two countries have chosen multiples of illegal gains as one of several alternative ways to calculate the maximum fine.

One possible explanation for this might be the difficulties encountered in assessing the gains from illegal cartels. These difficulties, which have already been stressed in the respondents' evaluations of the statements made by the OECD, are illustrated by the answers provided by the respondents to this survey: all in all, just 14 cases involving estimates of the proceeds from a cartel have been reported for the three years taken into account. Given the fact that a total of 353 cases were dealt with during this time, such estimates apparently take place in not even 4 per cent of these cases. Related to the amount of penalty decisions taken in the two jurisdictions allowing for such maximum fines, the percentage remains at 12 per cent (14 out of 121).

Another reason for not using illegal gains to define the maximum penalty might be their vagueness. Even those countries which have adopted this criterion explicitly in their national laws felt the necessity to combine it with an alternative maximum penalty in hard currency. In penal law, the principle of *"nullum crimen, nulla poene sine lege"* requires not only the deed, but also the punishment to be specified in clear and understandable terms in advance. Even though competition law is not a part of criminal law in all countries, the rationale behind this principle seems to somewhat influence the choice of the legislator: Monetary amounts or percentages of annual turnover convey a clear signal to offenders of the threat facing them.

The most obvious difference between these two most widely adopted solutions to specify the maximum penalty for participating in a cartel is their reference point. Fixed or index-linked monetary amounts apply to everybody, putting a "price tag" on cartels as such. In contrast to this, a percentage of annual turnover relates to the size of the company committing the offence, applying the same percentage rate but different maxima to different



companies, if needs be. It is noteworthy that most jurisdictions chose the annual turnover as a reference point for the economic strength of a company, with only one country also referring to their assets' value.

The next interesting choice is which benchmark is chosen to calculate the percentage of annual turnover: In opting for a company's **global** turnover, the entire group is held responsible for the breach of competition law which might have been committed by just one subsidiary. Such a solution might enhance the incentives for assuring compliance within the group. Having said that, the fine is more closely related to the offence committed in confining the turnover to **the market affected**. This calculation method reflects an effort to relate the size of the fine to the amount of damage done, which more easily chimes with

the penal law principle of relating punishment and mischief. Furthermore, if the cartel is fined in several jurisdictions simultaneously based on its market-related turnover, this might help to avoid claims of having been punished twice for the same offence, contrary to the *"ne bis in idem"* principle. A third option used is to relate to the **national** turnover of the company, or to **combine the national turnover and the exports** of a company. These reference points might be considered an intermediate solution. By the way, one agency indicated that the maximum fine is not related to the annual turnover of the preceding business year, but amounts to a percentage of the company's national turnover in **the last three business years**. (As explained in more detail below, other agencies aggregate the company's turnover over several years in actually setting the fine.)

Another interesting point is the possibility existing in two jurisdictions to **double the maximum fines for recidivists**, which puts the idea of individual deterrence in the foreground.

If we consider the recent practice displayed in the diagram on the former page, it is striking that the highest sanction imposed on a company dropped by more than half from 2001 to 2002 and just slightly increased again in 2003. With regard to the average amount of fine per company, there has been a steady decrease, from five to four and then just over three million US-Dollars.

Setting the fine

As stated in the report dealing with effective institutions (Part II.1.a), "*A fundamental distinction has to be made between systems that vest the institutional power to take enforcement decisions in the same legal entity which also investigates the case, and regimes which reserve this power to the courts or administrative tribunals.*". Accordingly, some agencies set fines in cartel cases themselves, others do not. The role played by the competition authorities in the second case differs widely. Sometimes the courts set fines with no input from the agencies. In other jurisdictions, the competition authorities may recommend a specific fine to the court, thus disposing of a strong *de facto* influence. Some agencies participating in this survey provided more detailed explanations of their way of calculating fines, which are delineated below.

Generally speaking, the **transparency** of the methods used in actually calculating the fines varies greatly from country to country. Some jurisdictions publish "guidelines" about their way of setting fines, exposing their current standards and practices to the general public.[15] Others prefer to make their decisions on a case by case basis, avoiding to expose their way of setting the fines in great detail ahead of time. Interestingly, this difference does not seem to coincide with the divide between countries traditionally adhering to codification and those applying common law rules, given that for example in Europe, the countries having published sentencing guidelines include the United Kingdom, the Netherlands and France.

15 Some examples include: the United States Sentencing Commission, *Guidelines Manual,* (USSG) (2004), *available at* http://www.ussc.gov/2004guid/TABCON04.htm. The Guidelines Manual is updated at least once a year, and the most current version can always be located at http://www.ussc.gov/GUIDELIN.HTM.); for further details on the method of calculation of fines imposed in the EU jurisdiction, see http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/c_009/c_00919980114en00030005.pdf; the Office of Fair Trading has published the guidance as to the appropriate amount of a penalty at: http://www.oft.gov.uk/nr/rdonlyres/4546166b-0413-45e4-8c8f-208cc3cdc325/0/oft423.pdf; the French Conseil de la concurrence published its criteria in its *1997 Annual Report.*

The most commonly used **method** to calculate the fine seems to be the determination of a "basic penalty" or "base fine" which is adjusted in taking into account mitigating or aggravating circumstances, which might be expressed as a multiplier or as the deduction or addition of certain percentages of the base fine. If needs be, the fine is then adjusted to the minimum and maximum penalties foreseen by the respective jurisdiction.

In setting the fine, the **criteria** applied vary from jurisdiction to jurisdiction, but there seems to be a general agreement on taking into consideration both the gravity and the duration of the infraction. Other criteria referred to include the degree of guilt and the financial position of the offender as well as his willingness to cooperate and to end his participation in the cartel. More detailed descriptions referred to the type and scope of the restriction, the dimension of the market affected, the market share of the undertaking, the effect and the duration of the restriction and the repetition of the prohibited conduct as relevant factors in setting the fines. One agency mentioned that the threat to economic competition and the range and extent of harm to the interests of consumers are of importance.

Given that the interdiction of cartels serves the purpose of protecting free competition, this suggests taking into consideration the amount of harm actually done to it in assessing the **gravity** of a cartel. A way to achieve this is to analyze both the market impact of the cartel behaviour in question and the size and importance of the affected market(s).

One possible track is to establish standard practices applicable to all cases. For instance, several jurisdictions have undertaken a tentative classification of cartel infringements, distinguishing minor, serious and very serious infringements to which different scopes of fines are assigned. Hard core cartel conduct is usually classified as very serious (cf. III.2.a). A second possibility to earmark the gravity of the infraction is to calculate the antitrust fine in relation to the company's volume of commerce in the goods or services that were affected by the violation.

There are also various ways of taking into consideration the **duration** of the cartel. Some jurisdictions determine the penalty in assessing the affected volume of commerce for the full duration of the cartel. Others base their calculation on the affected volume of commerce for either the last business year only or for a limited number of years and then adjust this penalty to the duration of the infringement. A third possibility used to take into account the duration of the offence is to increase the amount of the penalty in proportion to the time it lasted (e.g. an increase of 10% per year).

Examples of **aggravating factors** mentioned include destruction of evidence, leading or instigating the infringement, involvement of directors or senior management, retaliatory or other coercive measures taken against other companies aimed at ensuring the continuation of the infringement, continuing the infringement after the start of the investigation, repeated infringements by the same company or other companies in the same group, infringements which are committed intentionally rather than negligently, and retaliatory measures taken or reprisal sought by the company against a leniency applicant. Some of the **mitigating factors** enumerated related to the role of the company in the infringement, e.g. where the company was acting under severe duress or pressure, genuine uncertainty as to whether the conduct constituted an infringement, efforts to ensure compliance with the applicable competition laws, termination of the infringement after the agency's intervention and co-operation during the investigation.

c) Bankrupting Companies?

Another interesting question is just how far deterrence should go. To phrase it polemically: Should individual companies be sacrificed for the general good of protecting competition? The results of this survey are prone to show the general acceptance of the contrary. This choice might be interpreted as an illustration of the principle of proportionality, but it might also relate to the fact that pushing a company to bankruptcy always results in eliminating a competitor from the markets, which might lead to monopolization in the end.

Two thirds of the jurisdictions participating in this survey have the possibility to take into account the ability of the company to pay the sanction in calculating the fine imposed. Almost half of them have means to ensure that the fee imposed will not result in the company having to file for insolvency. Just one third do not dispose of either safety belt to avoid the company's crash. Half of those are not obliged to impose a minimum fine on offenders, half of them are.

One agency reported that even though there is no statutory or other requirement regarding an infringing company's ability to pay a fine, it considers the risk of insolvency as a result of the imposition of a fine before deciding on the appropriate amount of a penalty as a matter of general practice.

Inability to pay can relate to the amount of payment or the timing of payment. The more detailed explanations given in response to this survey refer to possibilities of considering the companies' financial situation with regard to both situations. For example, one agency indicated *inter alia* that inability to pay is treated as a mitigating factor, an amount being deducted from the overall fine. Another agency mentioned that payments by instalments could be considered. Some agencies even mentioned the possibility of further delaying or reducing the penalty payments after the imposition of the fine if unforeseen financial difficulties arose.

One of the agencies survey pointed out that

> *if the company's inability to pay is ignored in setting the fine, but the company has the ability to appeal the fine amount, this appeal right may not be of much practical use if the company has to pay interest on a huge fine during the appeal process. Also, lenders may react to the imposition of a huge fine that is being appealed by calling loans before the appeal is complete. If the company loses its loans, it might not be able to survive. There is a need for convergence in whether inability to pay is considered in imposing a fine. If companies with an ability to pay problem are facing fines in multiple jurisdictions, and some governments consider ability to pay but others do not, with the result that the viability of the company is jeopardized, then the efforts of some jurisdictions to consider inability to pay are really worthless.*

Some countries pointed out that companies claiming the risk of insolvency will have to provide financial details in support of their claim. As a next step the real ability to pay by the undertaking concerned would be analysed in verification of the claims made. One agency indicated that its financial experts will review the financial data, and

if necessary, interview company financial officials to verify the company's inability to pay. Another agency pointed out that it referred to the figures reported in the audited financial statement of the previous fiscal year for this purpose. The various methods used show that specific expertise is needed to assure an adequate assessment of the financial situation of a company. Some agencies even rely on reviews of external auditors.

One agency stressed that the reduction of the fine shall not be more than is necessary to ensure that the company's continued viability is not jeopardised.

How to determine a company's ability to pay ?

The goal of the analysis of a company claiming a risk of insolvency is to determine a reasonable estimate of current and future net cash flow from ongoing operations, which together with other factors permit a decision to be made on the company's ability to fund the assessed fine. The documents and criteria reviewed are case specific. The documents may range from S.E.C. filings of publicly traded corporations to detailed internal management reports. Examples of internal documents reviewed include government filings, audited financial statements, annual and quarterly financial statements, budgets and forecasts, short term and long term strategic business plans, tax returns, loan agreements, and significant contracts or lease agreements. Examples of criteria reviewed include financial flexibility, degree of economic integration between defendant and companies with common ownership, cash and other liquid investments, non-operating assets, loan schedules and covenants, recapitalization, guarantees, dividend policy, historical financial performance, projected annual operating income, discretionary spending, capital requirements, cash generating ability, economic characteristics of the industry, unique company characteristics, quality and stability of management, and contingencies, including anticipated liability to civil plaintiffs and other jurisdictions with open investigations that have a history of prosecuting cartel offences.

d) Personal Responsibility: Fining Entrepreneurs and Managers

On the one hand, individuals might be held responsible for the cartel conduct if they are identical to the company involved, i.e. if there is no legal person accountable for it. On the other hand, legal representatives or members of the management bodies of incorporated enterprises may also have to account for their role in the cartel conduct blamed on their employer. This personal liability can provide a strong impulsion for the decision-makers to abstain from cartel activity. In this context it is important to bear in mind that even though the companies benefit most from cartel activities, the forbidden acts are always committed by individuals.

Almost three quarters of the participating agencies stated that their countries' laws provide for financial sanctions against natural persons in cartel cases.

More than half of those have maximum fines expressed as **specific monetary amounts,** one opting for an **index-linked amount.** One respondent has a **turnover-based maximum** fine for individuals and three countries opted for a combination of specific monetary amounts and percentages of turnover. Another country combines a specific monetary

amount with **multiples of illegal gains,** having to absorb the financial gain in any case. One country even allows for unlimited fines for offenders.

While the preferred solution in establishing maximum fines for companies is to express it as a percentage of annual turnover, individuals mostly face the threat of a specific monetary amount. It is interesting that none of the respondents has a system establishing a percentage of the annual salary or the private property as a maximum sentence for entrepreneurs or managers. The theoretical difference made in fining the companies as such and the personnel responsible is reflected in a parallel examination of the facts: The highest sanction imposed on an individual is just a fraction of those imposed on companies. It was roughly 1/340 in 2001, one twenty-fourth in 2002 and 1/197 in 2003. The same is true for the average amount of fines imposed: In 2001, individuals paid 1/73, in 2002 one twenty-eighth and in 2003 1/22 of the amount paid out on average by companies. By the way, this development is owed both to the remarkable decrease in average company fines and the increase of the average fine per person, which doubled from 2001 to 2002 and remained roughly stable afterwards, at around 150.000 US-Dollars over the last three years.

The rise and fall in the highest fines imposed on individuals was also somewhat different from the company-related fines: The most severe fine imposed in 2001 was roughly one sixth of the one pronounced in 2002, whereas 2003 was again a mild “fining year”. This fact is even more interesting seen in the light of the very mild highest fines imposed on companies in 2002, which was below average. The increase in the highest fine average imposed on individuals coincides with a very large increase in the number of individuals fined, amounting to 330 in 2002 after 51 in 2001 and dropping back to 63 in 2003. It seems that since the average fine remained approximately stable from 2002 to 2003 some rather low fines were imposed in 2002 along with the remarkably high maximum fines.

One of the problems linked to the deterrent effect of fining individuals is the risk of the company reimbursing its director or manager afterwards. In this context one of the agencies surveyed stressed that the managers directly or indirectly liable for their company’s infringement shall be personally and exclusively liable for the fine. However, none of the agencies described any kind of safeguards to prevent the **reimbursement** of managers for the fines paid by their employer. And it is true that such legal tools are difficult to imagine.

By the way, the other extreme, i.e. the **financial ruin** of the offender, has been taken care of at least by some respondents. One agency mentioned that for individuals, except in the case where the sentence for an offence includes a minimum fine, the competent court may fine an offender only if it is satisfied that the offender is able to pay the fine or discharge it by earning credits for work performed during a period not longer than two years in a fine option program established for that purpose. Another agency pointed out that individuals have the same possibilities as companies to assert ability to pay problems. Documents that would be reviewed to verify the ability to pay of an individual include a personal financial statement and individual tax returns. The criteria that would be considered include personal assets and liabilities, current and

future earnings potential, and the sale or transfer of any individual assets during the relevant time period.

e) Sending Decision-Makers to Jail?

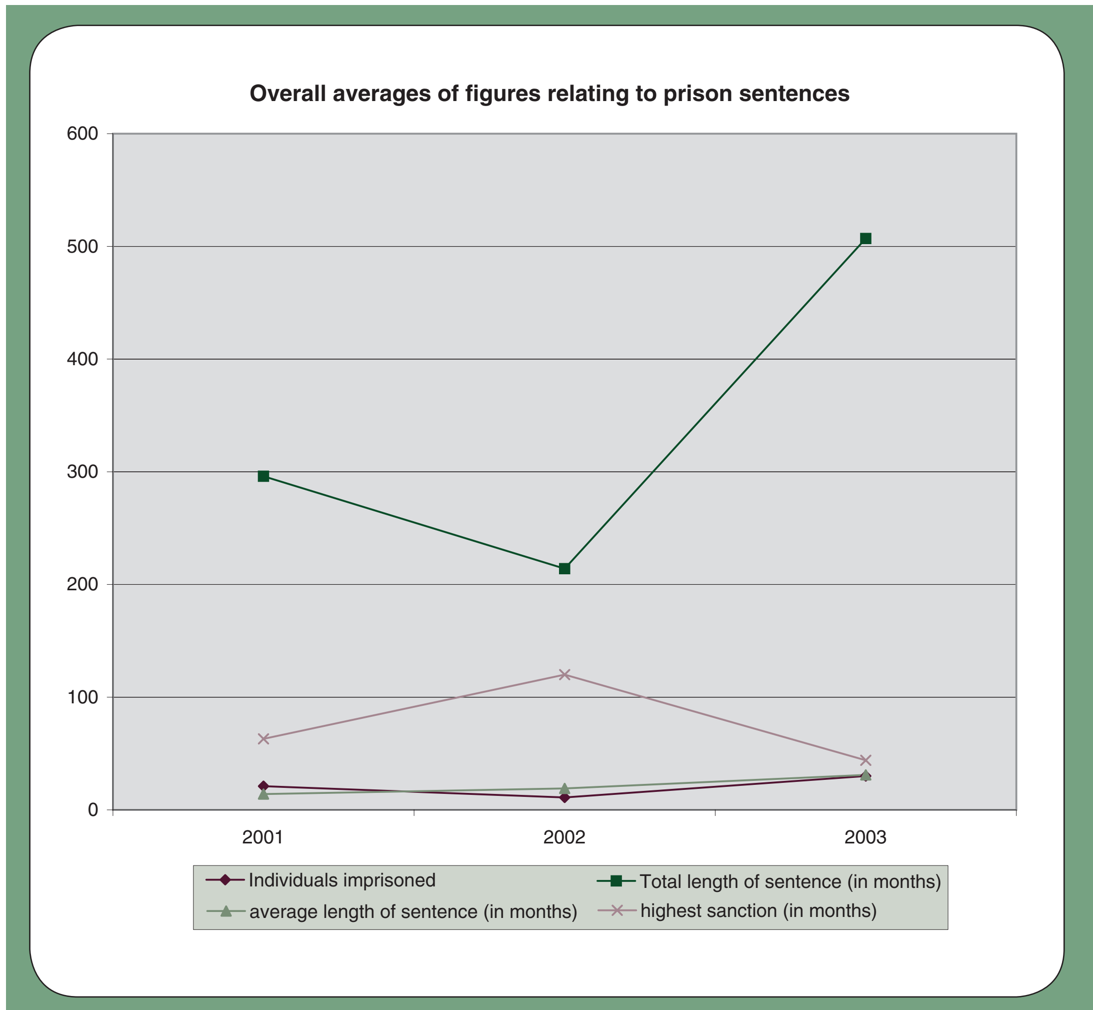
Another possible way of creating a strong incentive for responsible managements to prevent cartel offences is the imminent threat of being sent to jail for such an offence. 42 percent of the countries surveyed have the power to imprison natural persons. It comes as no surprise that those countries which do not impose fines against individuals also do not provide for prison sentences. Seven countries among those fining individuals do without jail and five provide for jail sentences. One quarter thereof have maximum sentences exceeding five years and three quarters have maximum sentences ranging from one to five years.

With regard to minimum sentences, more than half of the countries concerned either have no statutory minimum at all or a minimum sentence of less than a year; three countries indicated applying minimum sentences of more than a year but less than five years.

The recent case law is even more cautious: Only two of the eight countries responding which theoretically provide for the instrument of imposing prison sentences have actually put it into practice - and one of them has only started convicting individuals in 2003, but suspended the execution of all sentences. The average length of imprisonment from 2001 to 2003 has roughly been a year and nine months and decreases to one year and five months if the suspended sentences are counted out.

Even though these figures might be related to the relatively new introduction of prison sentences in some legal systems and the difficulties of assessing them, this circumstance nevertheless invites the conclusion that the instrument of prison sentences is applied rather cautiously as a sanction for cartel conduct, since the average prison sentence does not even come close to the statutory maximum.

This prudence in pronouncing prison sentences might also be connected with the fact that criminal sanctions warrant the observation of specific substantive and procedural criteria all over the world, such as e.g. a higher standard of proof, which might be difficult to meet in cartel cases.



f) Further Penalties

Two agencies indicated that their sanctioning systems provide for further penalties for natural persons. One of them explained that a company director who commits a breach of competition law and whose conduct as a director makes him unfit to be a member of a company's management may be **disqualified** from acting as a company director for a maximum period of 15 years. It is *inter alia* a criminal offence to be a director during the disqualification period or to be involved in or take part in any way, directly or indirectly, in the promotion, formation or management of a company during this period. The other agency pointed out that **a range of criminal penalties** including restitution orders, community service, orders not to leave the country and supervision, may apply.

3. Improving Effectiveness

a) National Studies on Effective Penalties

Four agencies indicated that studies on the effectiveness of penalties have been undertaken in their jurisdictions. One of them mentioned no sources or further details. Another agency pointed out that the research and investigation branch of the authority is currently investigating and preparing such a report, which will not be published in the press.

In three out of four cases the studies undertaken led to changes in the legislative framework but none of the agencies changed their case management.

Further information about the national reports may be found at the following web-sites:

The Australian TPA Review Report at http://tpareview.treasury.gov.au

The report recommended the introduction of criminal sanctions for serious, or hard-core, cartel behaviour, with penalties to include fines against any convicted corporation and imprisonment and fines, as appropriate, for implicated individuals. The predominant reason for suggesting that there should be criminal penalties was that the threat of imprisonment would be an effective deterrent to cartel behaviour. The report indicated, however, that before a criminal system was implemented, that it would be necessary to address certain issues such as the development of a satisfactory definition of serious cartel behaviour and a workable method of combining a clear and certain leniency policy with a criminal regime. Another important aspect was pointed out was that an effective sanction for cartel activity should take into account the expected gains from the cartel.

The Japanese Report of the Study Group on the Antimonopoly Act (October 2003) at http://www2.jftc.go.jp/e-page/press/2003/october/1.pdf

The Japanese Fair Trade Commission highlighted this quotation from the report:

> *Looking at circumstances in which cartels and bid riggings continue with no apparent end in sight, it is difficult to state the effectiveness of provisions to prevent cartels and bid rigging have been adequately assured. Furthermore, the deterrence power of Japan's enforcement systems remains relatively weak when viewed internationally as well. Accordingly, there is a need to conduct a comprehensive review from the standpoint of further ensuring effectiveness. When doing so, it will be necessary to continue giving attention to issues such as the function and division in enforcement systems between administrative sanctions, taking into consideration the need to accelerate the deposition of cases in conjunction with increased speed and greater information about economic activities, and criminal penalties, as well as the proper approach for the investigation power required for elucidation of the facts in each case. And to review with the proper balance enforcement systems overall that are comprised of elimination measures, surcharges and criminal penalties.*

The American study of Gregory J. Werden, The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook, Economic Analysis Group Discussion Paper (Jan. 2003), available at www.ssrn.com.

The author calls attention to the great weight of evidence supporting the criminal prosecution of cartel activity. He reviews the available literature on the effects on prices of bid-rigging and price fixing and concludes that, although there is need for additional empirical evidence on this issue, there is clear indication of price increase due to collusive behaviour in the cases analyzed, followed by price decreases when investigations were initiated. More specifically, Gregory Werden offers a critique of a 2003 review by Robert Crandall and Clifford Winston of the study of price effects of cartels. According to the critique, Crandall and Winston cite one 1993 study of the price effects of cartels which is flawed because of the inadequacies of the time frame and products considered. Price changes after indictment were considered, but many cartels break down at or prior to the initiation of an investigation. Also, the critique states that the products considered included so much more than the cartelized market that the effect of the cartel was easily lost. In addition, the critique states that other studies of the price effects of cartels were ignored. The critique cites 11 additional studies from 1989 to 2001, mainly prepared by experts in treble damage actions, that found price increases from cartels ranging from 6.5% to 36%.

b) Self-Assessment of the Competition Agencies

A very interesting part of the questionnaire's results is the self-assessment undertaken by the agencies with regard to the effectiveness of the penalties provided for under their competition law regimes and the explanations given to support their opinions. A couple of respondents provided no self-evaluation, since they considered this would be premature in view of the recent introduction of new penalties and the lack of practical experience to date. One agency indicated that it does not yet have the right to sanction companies or individuals and therefore classified its system as ineffective.

Facets of Effective Penalties

Six agencies considered the penalties available under their national competition law to be effective and pointed out various reasons for that. Most of them attached great importance to the ability to impose high fines.

One agency thus emphasised the possibility to impose fines of up to 10 per cent of the company's annual turnover in the preceding business year. Another agency pointed out that the possibility to impose fines of up to 10 per cent of the company's worldwide turnover as well as the possibility to increase a fine for reasons of deterrence allowed for the imposition of effective sanctions. It further noted that despite effective sanctions, cartel infringements continued to be uncovered so that it remained to be seen over time whether the recent level of fines imposed would attain the desired deterrent effect.

A third agency mentioned the recent increase of maximum fines to 10 per cent of a company's global turnover or, in case of individuals, to a large amount, and the initiation of a leniency

program. The success of its immunity programme in many new investigations was crucial for another agency.

Another survey respondent believes that stiff fines and prison sentences are the most effective deterrents for cartel behaviour. In this jurisdiction, the maximum penalties have recently been increased to $100 million for corporations, $1 million for individuals, and a 10-year jail term for individuals They are expected to be even more effective than the prior penalties.

Similarly, the combination of corporate fines (up to 10 per cent of a company's worldwide turnover in its last business year) and sanctions against individuals (i.e. up to unlimited fines, imprisonment of up to 5 years and disqualification as a director for up to 15 years) was considered to give the competition authority the ability to impose effective sanctions for cartel behaviour with considerable deterrent effect.

Unfortunately, the ideal method of penalizing cartel conduct cannot be determined by comparing notes of those agencies considering their penalties regime to be effective. Actually, the prominent features of these six regimes vary to a great extent.

For example, specific penalties for hard core cartels are provided for in exactly half of them. Four "effective" regimes allow for fines for individuals, while two of them do not. The possibility of jail sentences exists in three of those six countries. In calculating the maximum fine for companies, four of the "effective" regimes rely on percentages of annual turnover, one uses a specific monetary amount, and another one has a combined solution.

However, it is noteworthy that the relatively small portion of agencies which have imposed both the major part of the penalties and the on average highest sanctions are most satisfied with their penalties regimes. When comparing the figures below to the overall figures provided by the 19 agencies participating in this survey (cf. chart at III.2.a), one can observe that these six respondents have

- taken more than half of all of the penalty decisions
- fined more than half of the companies penalized in 2001 and 2002
- inflicted almost 100% of the total amount of fines against companies in 2001 and 2002[16]
- on average levied significantly higher fines per company
- fined a percentage varying between approximately 5% to 50% of the individuals penalized with an amount accounting for 17 to 95% of the total amount of individual fines imposed

[16] In 2003, the statistics are mainly jumbled by the significant fines imposed in a very prominent case by one agency; if those sums are deducted from the total amount of fines imposed on companies, the "effective" regimes account for 96% of the remaining figure.

- on average imposed manifestly higher fines per individual in 2001 and 2002
- on average imposed a highest sanction both on companies and on individuals which was twice as high in 2001 and 2002
- sentenced all the individuals imprisoned in 2001 and 2002; in 2003, they are accountable for 63% of the numbers of individuals sentenced and of 78% of the total jail time imposed

"Effective" regimes

Recent experience	2001	2002	2003
Penalty decisions in cartel cases	65	63	71
Cases terminated differently	16	21	24
Number of companies fined	100	74	64
Total amount of fines against companies	1.948.383.674,31	1.099.673.724,63	681.110.614,62
Average amount of fine per company	9.363.897,65	7.438.836,29	5.950.859,83
Number of individuals fined	24	15	20
Total amount of fines against individuals	2.470.855,43	8.340.517,07	823.471,44
Average amount of fine per person	100.036,22	342.223,04	45.341,22
Number of individuals imprisoned	21	11	19
Total lenght of imprisonment (in months)	296	214	397
Average length of imprisonment (in months)	14	19	21
Highest sanction imposed on a company	182.850.318,09	74.750.291,53	40.167.841,78
Highest fine imposed on an individual	548.427,72	3.797.758,54	100.000,00
Highest prison sentence imposed on an individual (in months)	63	120	70
Number of cases in which the total gain was estimated	4	5	5
Amount of total gain	2.130.819,40	2.531.202,24	3.926.327,81

The highest sanctions indicated are an average composed of the highest sanctions indicated by all relevant respondants.

Figures Provided by the Systems Deemed to be «Effective» Expressed as Percentages of the Overall Survey Figures

Recent experience	2001	2002	2003
Penalty decisions in cartel cases	53	55	61
Cases terminated differently	14	24	55
Number of companies fined	56	51	37
Total amount of fines against companies	98	99	45
Average amount of fine per company	172	173	183
Number of individuals fined	47	5	32
Total amount of fines against individuals	42	95	17
Average amount of fine per person	134	219	30
Number of individuals imprisoned	100	100	63
Total length of imprisonment (in months)	100	100	78
Average length of imprisonment (in months)	100	100	68
Highest sanction imposed on a company	195	198	80
Highest fine imposed on an individual	199	246	39
Highest prison sentence imposed on an individual (in months)	100	100	159
Number of cases in which the total gain was estimated	100	100	100
Amount of total gain	100	100	100

These figures have to be read with several caveats in mind. First of all, the self-assessment of the agencies is merely subjective and not based on any common standards and/or criteria. Secondly, the data might also in part reflect difficulties in collecting statistics rather than the real level of sanctioning activity or inactivity. Thirdly, the information has only been collected for a very limited period of time.

Keeping in mind these reservations, it seems nevertheless possible to conclude that it is important not only to create an appropriate legal and administrative framework but also to make full use of the possibilities it offers.

This finding is also supported by the replies of other agencies who felt unable to assess the quality of their penalties regime, since the penalties had only recently been introduced to their national competition laws.

Suggested Improvements

Those agencies which were quite, but not completely, satisfied with their respective sanction regimes saw room for improvement in several areas. Some agencies supported the introduction of additional sanctions or the amendment of existing sanctions in their competition law and others referred to practical challenges.

One respondent believes that although the amount of the fine imposed on companies has enough deterrent effect, the question of personal responsibility (fines on individuals) might be studied.

Another agency positioning itself in the midfield stated that it had – so far unsuccessfully - advocated the introduction of criminal sanctions for hard core cartel conduct.

A third answer pointed out that the maximum fines available were currently very nominal due to the inflation which has taken place since the promulgation of the ordinance 34 years ago.

Another contribution criticised minor difficulties in four areas: First of all, the companies do not have to pay interest on the fines if they go to court which invites them to engage in lengthy proceedings. Secondly, the calculation of the maximum fine expressed in terms of illegal gains has proven difficult since taxes the companies paid on the financial gains have to be taken into consideration and, if damages are paid to third parties after the fine has been executed, these amounts have to be reimbursed under specific circumstances. Thirdly, the amount constituting one of the alternative maximum fines was fixed in 1980 and is now much too low. Last but not least, some difficulties have been encountered in court recently in meeting the standard of proof of financial gains which is the basis for calculating high fines. The agency therefore advocates changing the present method of calculating the maximum fine based on multiples of illegal gains to a turnover-based approach. The agency hopes that these issues will be settled in the current legislative process.

Another agency pointed out that a substantial part of the fines imposed has not been paid by the economic agents due to the various methods of appeal against the agency's administrative decisions brought before the courts.

Finally, one agency observed that the penalties contributed to some extent to the prevention of violations but noted that the number of businesses repeating violations was not insignificant.

4. Conclusions

There is wide agreement that an effective penalty needs to be deterrent. An effective deterrent, in turn, is one that promises, on average, to take away at the minimum the financial gains that otherwise accrue to the cartel members.

In the case of fines against enterprises this would mean that both the expected gains from the cartel and the probability of detection have to be taken into account. Unfortunately, this theoretically ideal way of setting a deterrent fine is somewhat difficult to apply in practice, since it is difficult to assess and prove the benefits derived from cartel activities and almost impossible to determine the probability of detection. Thus, there seems to be no secret recipe for an effective penalty.

However, when looking at the penalties available under existing competition laws, one cannot help but notice a wide variety of ingredients to choose from. A survey of the agencies' current possibilities to sanction cartels denotes the diversity of methods used and the wide range of options available: All of the national systems examined allow for financial sanctions against companies and almost three quarters foresee fines against individuals. 42% of the countries surveyed even allow for prison sentences.

In assessing the effectiveness of these types of sanctions, the possibility to impose high fines is regarded as a matter of importance by many, even though the methods chosen to determine the appropriate amount of a penalty still vary. Furthermore, the significance of the personal liability of the decision-makers is stressed. Some agencies also emphasise the effectiveness of criminal sanctions as a deterrent.

However, all of these instruments have their inconveniencies. Imposing too high a fine on a company might have the undesired effect of bankrupting it and thus harming competition even further. When it comes to fining individuals, it is admittedly difficult to prevent their reimbursement by the companies they work for. Prison sentences might constitute very effective deterrents but their imposition implies very high procedural and substantial standards and guarantees.

Interestingly, the use made of these sanctions differs widely, one third of the survey's participants not reporting any cartel case at all within the three years' period examined. Prison sentences, for example, were issued only by a quarter of jurisdictions having the possibility to do so. In any case it is noteworthy that the relatively small portion of agencies which have imposed both the major part of the penalties and the average highest sanctions are most satisfied with their penalties regimes. These findings suggest that maybe in some cases it is not necessary for a jurisdiction to legislate to increase its maximum sanctions, in order to increase effectiveness, but for agencies to sanction up to the maximum possible under existing law.

In addition to the traditional means of state punishment, attention is drawn to additional means of achieving deterrence. An important example is the obligation to publish the sanctioning decision, since the harm done to the good name of a company might act as a very strong deterrent. Companies guilty of bid rigging might be excluded from public procurement

procedures for a while. Company directors might be disqualified from exercising their functions for a given period of time. Even penalties such as restitution orders, community service, orders not to leave the country and supervision, may apply. This is one of the points which will definitely need to be further developed in the future, since it offers a completely new perspective on punishing cartels.

Another interesting fact is that some jurisdictions provide for the possibility to double the maximum fines for recidivists. This suggests that there have been cases of recurring infringements. Given that the aim of individual deterrence is to prevent recidivism, this aspect would merit examination in more detail.

It is equally noteworthy that although leniency has not been studied within the framework of this project, this topic could not be entirely excluded: Effective penalties are unanimously judged to be an incentive to make leniency programmes work, and one agency believed that its successful leniency programme was the basis for putting penalties into practice effectively.

All in all, the facts and ideas gathered in the framework of this project by the general framework subgroup are intended to serve as a starting point for further reflection and discussion. Some of the questionnaire's results raise further questions and show different paths to be explored, reflecting general agreement on some basic concepts but also highlighting the different possibilities used in putting these ideas into practice. It will be particularly interesting to further explore the notion of effective penalties in conjunction with the question of effective institutions which are required for putting them into practice.

European Commission

Building blocks for effective anti-cartel regimes
Defining Hard Core Cartel Conduct — Effective Institutions — Effectives Penalties

Luxembourg: Office for Official Publications of the European Communities

2005 — iv, 75 pp. — 17.6 x 25 cm

ISBN 92-894-6737-1

KD-66-05-070-EN-C

International Competition Network

Publications Office
Publications.eu.int

ISBN 92-894-6737-1
9 789289 467377