International Competition Network

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Cartels Working Group
Subgroup 1 - general framework

CO-OPERATION BETWEEN COMPETITION AGENCIES IN CARTEL INVESTIGATIONS

Report to the ICN Annual Conference
Moscow
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I. INTRODUCTION

Given the increasingly international nature of cartels, crossing the boundaries of jurisdictions, co-operation in cartel cases is growing in importance. Co-operation can involve for instance, coordination of simultaneous searches, raids or inspections, exchange of information, discussions on general orientations regarding investigations, or gathering of information and interviewing of witnesses on behalf of another agency.

However, there is a widespread feeling in many competition agencies that such co-operation is still sub-optimal. Certain kinds of co-operation can only take place between certain agencies, depending on the nature of the agreements between their jurisdictions; often, certain types of material cannot be exchanged (particularly with regard to so-called 'confidential' information), procedures may be long and cumbersome and vary according to the co-operation instrument involved. Insufficient co-operation between agencies may allow some cartels to escape detection completely, if the evidence required for their conviction is scattered in different jurisdictions which cannot share it for legal reasons, or even if one agency has adequate information to carry out a successful prosecution, other jurisdictions which have also been harmed by the cartel may find themselves unable to sanction it because of their inability to obtain the necessary information from other agencies. Either way, the result can be underenforcement and undersanctioning of cartels.

Against this background, as part of its work plan for its second and third years of existence (from the ICN Annual Conference of 2005 to that of 2007), the ICN cartels Working Group has chosen to carry out a project on co-operation between competition agencies in cartel investigations, within the framework of subgroup 1 (general framework)[1]. DG Competition of the European Commission volunteered to take the lead in carrying out the project.

The project has three goals. Firstly, to carry out a stocktaking of the various forms of co-operation between agencies in cartel investigations which exist, and how frequently they are used. Secondly, to identify some of the barriers to greater co-operation. Thirdly, to propose some avenues for exploration as to how those barriers might be lowered or removed. Due to the wide-ranging nature of the subject, it was decided to spread the project over two years, with the stocktaking and identification of barriers phases to be completed for the 2006 ICN Annual Conference, and the proposals as to possible ways forward to be made in time for the 2007 Annual Conference.

Of particular importance for the development of co-operation between agencies are the successive OECD Recommendations on co-operation in competition matters (the most recent version in 1995), the 1998 Recommendation on effective action against hard-core cartels, and the three hard-core cartel reports prepared to date. OECD work in this field has been one of the main stimuli to greater co-operation between agencies[2]. In particular, the 1995 OECD Recommendation on Co-operation has inspired and served as a model for numerous competition agreements between jurisdictions. Most recently, in 2005 the OECD adopted Best Practices for the formal exchange of information between competition authorities in hard core cartel investigations, with a view to overcoming some of the concerns over the exchange of 'confidential information' which is of the highest value for such co-operation[3]. The Best Practices are based on the following principles:

- International treaties or domestic laws authorising a competition authority to exchange confidential information in certain circumstances should provide for safeguards to protect the confidentiality of exchanged information.
- Member countries should generally support information exchanges in cartel investigations. It should, however, always be at the discretion of the requested jurisdiction to provide the requested information in a specific case, or to provide it only subject to conditions, and there should be no obligation to act upon such a request.

[1] The ICN cartels Working Group carries out its work in two subgroups, subgroup 1 on the general framework for the fight against cartels, and subgroup 2 on enforcement. For more information, see the web page of the ICN cartels Working Group at: http://www.internationalcompetitionnetwork.org/cartels.html

[2] Annex 3 (bibliography), items 33-40.

[3] Annex 3 (bibliography), item 38.

- Appropriate safeguards should apply in the requesting jurisdiction when it is using the exchanged information.
- Information exchanges should provide safeguards for the rights of parties under the laws of member countries. The Best Practices specifically mention the legal profession privilege and the privilege against self incrimination. Regarding legal professional privilege, whichever of the levels of protection is higher – that of the requesting or the requested jurisdiction – should be applied[4]. The requesting jurisdiction should ensure that its privilege against self-incrimination is respected when using the exchanged information in criminal proceedings against individuals.
- In light of concerns that prior notice to the source of information can severely disrupt and delay investigations of cartels, the Best Practices advise against giving prior notice, unless required by domestic law or international agreement.

The subject of co-operation between competition agencies has been studied before (though not always with a focus on cartel investigations), and a large bibliography already exists[5]. However, much of the other written material is by academics or by private practitioners without the benefit of the experience or information of working within a competition agency, while speeches and publications on this subject by serving members of competition agencies have tended to be rather general in nature. The ICN cartels Working Group therefore felt that it would be useful to present a report based on some research among ICN member agencies as to the extent of co-operation in cartel cases which is taking place, and the barriers to deeper and more extensive co-operation.

In the first phase of the project, between the 2005 and 2006 ICN conferences, a questionnaire was sent by DG Competition to the agencies which are members of the Cartels Working Group, seeking information about their experiences of co-operation with other agencies in cartel investigations over the previous three years[6]. Twenty agencies responded to the questionnaire[7], and the information supplied in those responses forms the core basis for this report, along with existing published material, and the proceedings of the two ICN cartel workshops which have so far taken place[8]. The responses to the questionnaires were exceedingly useful, although a few of them reported a very limited level of co-operation, and some others could not provide answers to all of the questions asked for reasons of confidentiality or sensitivity of the information in question. Moreover, the replies to the questionnaire were not intended for publication, and are therefore not annexed to this report (although they are summarised in two tables, to be found at annex 2). The information which they provide is used in this report in such a way as to prevent identification of the agencies in question, except in cases where both co-operating agencies agree to be identified.

In phase two of the project, covering the year between the 2006 and 2007 ICN conferences, a number of ideas were considered for possible ways of trying to improve and increase co-operation. Two information sources were used. Firstly, a brief questionnaire on issues related to leniency policy and co-operation was sent out to a small selection of private law practitioners with experience of multiple amnesty/immunity applications in different jurisdictions[9]. The questionnaire focussed on the differences between leniency programmes which might discourage multiple amnesty/immunity applications or the granting of waivers. Secondly, the "cartel templates" (rules of law and procedures applicable to cartel investigations) filled in by many ICN member agencies and available on the ICN website[10], were used as a source of information about agency practice.

This report aims to fulfil all three parts of the project work plan, stocktaking, identification of barriers and possible ways forward. It therefore closes the project and fulfils the mandate given to the Cartels Working Group by the 2005 ICN conference.

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[4] Specifically, the requested jurisdiction should apply its own rules when obtaining the requested information and the requesting jurisdiction should ensure that no use will be made of information that is subject to legal professional privilege protection of the requesting jurisdiction.

[5] See annex 3.

[6] The questionnaire is annexed at annex 1.

[7] The competition agencies of Australia, Belgium, Brazil (SDE), Canada, the European Union, France, Germany, Hungary, Israel, Jamaica, Japan, Mexico, the Netherlands, New Zealand, Portugal, Romania, Serbia, South Africa, Switzerland and the United States (DoJ).

[8] In Sydney in November 2004, and in Seoul in November 2005. Issues relating to co-operation were discussed at both workshops.

[9] See annex 4 for the text of the questionnaire.

[10] See: http://www.internationalcompetitionnetwork.org/index.php/en/publication/277

II. BACKGROUND TO CO-OPERATION IN CARTEL CASES

There is a range of reasons why co-operation between competition agencies in cartel investigations may be beneficial in the fight against cartels. For example, it is possible that an agency may not be aware of a cartel affecting its jurisdiction, while another agency has cognisance of it. In the case of international cartels, co-ordination of investigatory measures may be necessary in order to avoid the risk of destruction of evidence if one agency moves before other agencies, on whose territory evidence may be located. Subsequently, agencies may well wish to gain access to evidence located outside their own jurisdiction. More general discussions and comparing of notes between investigators of the same cartel in different agencies may facilitate the smooth progression of the case, and better rebutting of the arguments of the parties. Information on turnover relevant for the calculation of sanctions may be exchanged. Between jurisdictions with sanctions against individuals, extradition proceedings may also play a part in co-operation.

Co-operation can take place at different phases of an investigation:

- At the *pre-investigatory phase*, that is the phase before evidence-gathering takes place, agencies can co-operate regarding markets to be investigated, companies to be targeted, the location of evidence, and avoidance of destruction of evidence;
- At the *investigatory phase*, the phase during which evidence is gathered and analysed, and the case built up, they may co-ordinate investigatory measures. This could include the organisation of simultaneous searches, raids or inspections, issuing of subpoenas or other requests for information, or interviewing of witnesses;
- At the *post-investigatory phase*, which concerns prosecution, adjudication and sanctioning, agencies may exchange evidence and other information which they have obtained, and they may co-operate via general case discussions between the investigators.

Exchange of information is a key aspect of co-operation, although by no means the only aspect. The kinds of information which may be exchanged fall largely into four categories:

- *Public information*. In this case, one agency simply helps another agency to gain time by providing information which is already in the public domain (perhaps a hard-to-find market report, or information about the market arising from studies carried out by the agency);
- *Agency information*. This is information which is not necessarily in the public domain, but which is generated within the agency itself, rather than provided by parties to the investigation (although it may be based on information supplied by the parties). Such 'agency information' may concern for example the stage which the investigation has reached, the planned timing of further steps, the provisional orientation of the investigation, conclusions reached about the nature of the market and so forth;
- *Information from the parties already in the possession of one agency.* This kind of material can be evidence of an infringement or background information on the market or the activities of the parties (such as turnover figures). The information may have been provided voluntarily (by an immunity/amnesty applicant, for example) or under compulsion (in an inspection, under subpoena, and so forth);
- *Information obtained from the parties at the request of another agency*. Where two agencies have a highly-developed co-operative relationship, it may be possible for one of them to request the other to obtain information from parties in its jurisdiction, which is not already in its possession. This could involve carrying out surprise searches, raids or inspections, issuing subpoenas, interviewing witnesses, and so forth.

As to the ways in which co-operation can take place, it can be based on some formal instrument of co-operation, such as a legal provision, or an agreement between jurisdictions or agencies. A waiver from a provider of evidence (typically an immunity/amnesty applicant in both jurisdictions), may also constitute the basis for co-operation. Alternatively, co-operation can be completely 'informal', in the sense of taking place outside of the framework of any specific instrument of co-operation. As a general rule, informal co-operation normally only involves general forms of co-operation or exchange of public or 'agency' information at most, while exchange of evidence, and obtaining of evidence on behalf of the other party, is normally based on a formal instrument.

There is a wide range of different types of formal instruments on which co-operation may be based. Foremost among these are co-operation agreements. Such agreements may be agency to agency agreements or jurisdic-

tion to jurisdiction agreements. They may be limited to co-operation in competition-related matters, or they may be more wide-ranging, but also including competition (Mutual Legal Assistance Treaties, for instance). However, provisions in national laws can also be a useful instrument permitting co-operation.

It is possible that an agency may be able to obtain evidence located in another jurisdiction without recourse to co-operation from the competition agency of that jurisdiction. For example, the company under investigation may produce the information in response to a subpoena or other request for information, or officials from the investigating agency may be able to interview witnesses in another jurisdiction themselves. Such cases fall outside the scope of this report, since no co-operation between agencies is necessary.

The section which follows constitutes a stocktaking of experiences of co-operation in cartel cases over the last years 2003-2006. It is structured largely on the basis of the types of co-operation identified in the questionnaire.

III. ANALYSIS OF TYPES/MEANS OF CO-OPERATION (STOCKTAKING)

1. Informal co-operation based on the 1995 OECD Recommendation on co-operation, other similar 'soft law' instruments, or with no particular legal basis

Informal co-operation (based on the 1995 OECD Recommendation on co-operation, other similar 'soft law' instruments, or with no particular legal basis) with other jurisdictions is in principle open to most jurisdictions. Although in the absence of an agreement with the other jurisdiction or a waiver from the provider of the evidence (typically an immunity/amnesty applicant in both jurisdictions), the information which can be exchanged is normally limited to more general 'agency' information (see more below), which may, however, concern all phases of cartel enforcement.

Even if informal co-operation is in principle available to all agencies which replied to DG Competition's questionnaire, it does not necessarily follow that this type of co-operation occurs frequently. In fact, most agencies did not report any concrete examples of having used informal co-operation in cartel cases. Some other agencies have indicated that they have used the OECD Recommendation in many merger and abuse of dominance cases, but so far not in any cartel investigations.

These agencies do not give any specific reasons for this lack of application, but have rather declared that should a cartel case occur where the Recommendation could be applied and it would be a useful tool, they would certainly use it. One agency also stated that until now there neither had been a real need for it to use this type of co-operation nor had any other authority communicated such a need towards it. Another agency stated that with respect to cartel cases, such international co-operation has not existed up to now, as it has not had any international cartel cases which would require it.

Those agencies which have used informal co-operation in cartel cases (six agencies responding to the questionnaire), seem to regard this type of co-operation as valuable and helpful, although up to date its usage appears in general to have been fairly informal and as one agency puts it *'a little ad hoc'*.

Most of the jurisdictions which have reported on having used some type of informal co-operation do not have many concrete examples of cases where it has actually been applied in cartel cases (the number of cases over the last three years reported per agency ranged from one to four, with the exception of one agency which has reported at least nine occurrences). Often the number of agencies with which this co-operation occurred coincides with the number of cases (for example one case with one other agency, four cases with four other agencies), except for the agency which reported nine cases (which occurred with five other agencies).

However, it should be noted that the agency which reported nine cases at the same time also stated that it does not consider that the co-operation under the OECD Recommendation has been significant, and that such co-operation has for the most part been limited to notifications of investigative and prosecutorial steps affecting another OECD member's interest.

Based on the results of the questionnaires, co-operation has occurred in all three phases of an investigation (pre-investigation, investigation and post-investigation), with most use in the first two phases. The information which can be exchanged is normally limited to more general 'agency' information.

One agency has defined 'agency' information to include '*general discussions with other agencies about, for instance, the nature of the infringement, our current assessment of the case, state of play of the procedure, number and names of undertakings active in the markets, products concerned, volumes/values of the markets, our idea of the geographical scope of the cartel and effects in other jurisdictions in general terms'*, however specifying that the names of the companies that are co-operating with the investigation cannot be disclosed without their agreement and that specific evidence obtained through the investigation cannot be communicated.

Several agencies have stated that the type of information received is being used as intelligence. However, confidentiality restrictions limit this type of co-operation. One agency stated that *'the information communicated*

in the notifications to foreign jurisdictions included information ordinarily treated as confidential […] but which may be communicated in certain situations, such as to a foreign agency if it will advance an investigation for the effective administration and enforcement […] . Any information communicated to a foreign antitrust agency will be subject to specific confidentiality safeguards, such as restrictions on use and disclosure.'

Specific examples of the types of co-operation at each phase of the investigation reported in the replies to the questionnaire are the following:

Pre-investigatory phase:

- sharing of leads and background information about the industry and relevant actors;
- notification of initial investigative actions which can facilitate later specific investigative requests for assistance;
- coordination of searches, raids or inspections and of interviews;
- travel by officials to foreign jurisdictions to conduct interviews.

Investigative phase:

- state of play of the procedure;
- general assessment of the case;
- travel by officials to foreign jurisdictions to conduct interviews of foreign parties relevant to the agencies investigation;
- order requiring a company to produce certain documents in the possession of its foreign affiliates.

Post-investigative phase:

- providing copies of public court filings;
- providing access to non-public information that is not statutorily protected or otherwise entitled to confidential treatment;
- co-ordination with other agencies on the filing of charges;
- notifications to foreign agencies of guilty pleas and convictions of foreign corporations;
- adoptions of decisions in cases which are also under investigation in other jurisdictions.

Many agencies report no difficulties with this type of co-operation, however, amongst the mentioned difficulties or disadvantages are the following:

- the main restriction appears to be the treatment of confidential information. The OECD Recommendation is a non-binding guideline and not sufficient as legal basis for specific co-operation on cartel cases. Therefore the transfer of information between authorities based on the OECD Recommendation involves the risk of violating the professional and business secrecy clauses;
- significant limitations on what type of information that may be exchanged (for example 'agency' information);
- the other agency must become aware that another agency is or may be dealing with the same case. As one agency puts it *'this situation is most likely to occur in cases where a company has made leniency applications in both jurisdictions and informed one or the other of this.'* This may also occur when an informant or whistleblower is willing to let the agencies share amongst them the information provided;
- a certain mutual confidence needs to exist.

One agency has also stated that *'currently, the OECD Recommendation does not add distinguishable value as compared to other types of co-operation arrangements, competition-specific co-operation agreements with jurisdictions or agencies with whom we co-operate most frequently*'.

On the other hand the following main advantages of this type of co-operation have been reported:

- very valuable and helpful source of co-operation;
- simple procedures (one agency may send an email asking for the information);
- allows agencies to learn about potential anticompetitive activity affecting their own market and other jurisdictions' enforcement intentions;
- facilitates notifications of enforcement activities to other jurisdictions.

Other comments included:

- *'the overall assessment of informal co-operation is that it is useful for agencies to use this source of exchange even if it has significant limitations'*;
- *'this co-operation has been very valuable, although to date it has been fairly informal and [a] little ad hoc'.*

2. Co-operation based on waivers

In cases where a company has applied for immunity/amnesty with at least two jurisdictions, and has granted a waiver permitting the agencies to share information, exchange of the information provided by the company is possible between the concerned competition agencies. However, such co-operation normally requires the agencies to have an immunity/amnesty programme in force and consequently the agencies which do not yet have this cannot take advantage of this type of co-operation, as pointed out by one agency[11]. Waivers may be granted in other circumstances than in the context of immunity/amnesty applications, but the replies to the questionnaire are not such as to make possible any discussion of wavers granted in other circumstances.

In the questionnaire carried out for this project, six agencies replied that they had applied co-operation based on waivers during the three years in question with one or more other agencies (out of twelve which have a leniency programme). The number of cases varied from one to 16 with up to eight other agencies (for example one agency reported ten cases with four other agencies, another agency seven cases with four other agencies and one agency had had 16 cases with eight other agencies).

The other respondents to the questionnaire either stated that they did not have the possibility to use this type of co-operation or that they have in fact not used it during the last three years. One agency explained that it did not have a leniency programme yet in force, and another agency that it has not had such international co-operation up to now as it did not have any international cartel cases that would require such co-operation.

As to the type of information exchanged, waivers permit, in principle, the exchange of confidential information from the immunity/amnesty applicant among the relevant competition agencies depending on the exact scope of the waiver. Waivers can for example allow the sharing and exchange of confidential information and documents obtained from the parties following their immunity/amnesty application, and to discuss the case and communicate the information to the competent authorities. The information exchanged includes information and evidence ordinarily considered confidential.

At the ICN Cartels Workshop in Seoul, it was emphasised by one agency that in its view it is important to keep immunity/amnesty applicants informed about exchanges of information contained in their applications with different agencies, and the use or potential use of such exchanged information. On the other hand, this is not done with exchanges of information from immunity applicants within the European Competition Network[12].

One agency reported that the information exchanged was used as intelligence for the following:

- developing the background, theory and strategy for the case;

[11] However, the unique information exchange arrangement in the context of leniency within the European Competition Network, described in section III.6. below, can allow an agency without a formal leniency programme in place to benefit from information supplied by a leniency applicant in another jurisdiction, provided the receiving agency has made a written commitment not to use the information to impose sanctions on the leniency applicant.

[12] See section III.6. below.

- judging the value and credibility of witnesses;
- preparing for witness interviews;
- support for a court order for a search or document production.

This type of co-operation has been used in all three stages of an investigation (pre-investigation, investigation and post-investigation). However, most cases reported concerned co-operation at the pre-investigatory and investigatory stages, and one agency also added that where *'co-operation has started at the pre-investigative stage, co-ordination has continued at the investigative stage'*. Specific examples of the types of co-operation at each phase of the investigation reported are the following:

Pre-investigatory phase:

- conference calls with foreign agencies regarding an immunity/amnesty applicant;
- notification of initial investigative actions;
- coordination of searches, raids or inspections and of interviews;
- sharing of leads and background information about the industry and relevant actors;
- general discussions about developing a common approach and case strategy;
- exchange of confidential documents regarding the companies and individuals involved in the alleged offence;
- exchange of information about market and product definitions;
- receipt of updates on the progress of legal proceedings in another jurisdiction.

Investigatory phase:

- contacts with the authorities in order to avoid conflicts of parallel proceedings;
- coordination of searches, document production orders and interviews;
- exchange of confidential intelligence regarding witnesses;
- exchange of ideas on settlement, allegations, fine level and confirmation of the period of the offence;
- exchange of information regarding the focus of the case for each agency and information relevant to the specific markets.

Post-investigatory phase:

- information exchange such as information on adoption of decisions in cases investigated in several jurisdictions.

Most of the agencies responding to the questionnaire have not reported any particular restrictions or problems with this type of co-operation. However, one example has been reported of an immunity/amnesty applicant which had also applied in another jurisdiction declined to grant a waiver, and another agency mentioned some circumstances that have caused difficulties:

- *'lack of predictability in timing of the exchange of key information'*;
- *'where investigations in jurisdictions are at different stages, coordination of investigative steps and sharing of information is more challenging. In some circumstances, the situation improved through face to face meetings with the foreign antitrust agency. In other circumstances, there was no resolution'*.

Despite those difficulties, co-operation based on waivers has in general been described as *'excellent and very useful as more detailed information may be exchanged'*. As one agency puts it *'Even in the context of co-operation under existing competition specific agreements, co-operation is enhanced where a waiver from the leniency applicant is in place'*. Other comments included:

- *'Waivers often allow agencies to exchange information quickly and at early stages and thus to coordinate initial steps in investigations. Waivers allow for a 'pick up the phone' type of co-operation, that is not delayed by the*

necessities of translation and routing through multiple official channels that are required in more formal types of co-operation, such as MLATs and letters rogatory';

- *'This type of co-operation was very valuable. It facilitated the development of working level relationships and dialogue with other antitrust agencies, which allowed […] access to certain types of information and evidence that would otherwise have been unavailable (i.e. evidence of cartel activity by the same company, but in a jurisdiction outside of […])'*.

3. Co-operation based on provisions in national law

Four agencies which responded to the questionnaire reported provisions in national law which can be used to permit or to facilitate co-operation in cartel cases: the German Bundeskartellamt, the Canadian Competition Bureau, the US DoJ, and the Romanian Competition Council. However, relatively few specifics could be provided by some of those agencies, partly for reasons of sensitivity of the information in question. Therefore, this section of the report is necessarily based also to some extent on published material.

Provisions in national law which facilitate and promote co-operation between agencies or jurisdictions fall into two categories, those which directly authorise the competition agency to co-operate with the agencies of other jurisdictions, and those which have no such direct effect, but act as a mandate for the conclusion of competition-specific co-operation agreements with other jurisdictions, pursuant to which co-operation can take place. However, all of the jurisdictions with laws directly permitting co-operation also have bilateral competition agreements with other jurisdictions, so clearly, even where there is such a law, there is a perception that bilateral agreements have utility.

Concerning Canada, section 29 of the Competition Act prohibits the communication of information in the possession of the Competition Bureau, including information produced voluntarily or obtained pursuant to the exercise of formal powers. However, communication of such information is permitted 'for the purposes of the administration or enforcement of the Act'. This allows information considered confidential under the Competition Act to be communicated to foreign counterparts where the purpose is for the administration or enforcement of the Canadian Competition Act, such as where the communication of the information would advance a specific investigation. Any information communicated to a foreign competition agency under the provisions of a bilateral or multilateral cooperation instrument will be subject to specific confidentiality safeguards contained in that instrument. As a matter of practice, if no cooperation instruments exist, the Bureau will consider the communication of information only after it is fully satisfied of the assurances provided by the foreign agency with respect to the confidentiality and use of the communicated information.

Furthermore, the Canadian Competition Act provides for mutual legal assistance agreements covering competition matters other than those in respect of which the Mutual Legal Assistance in Criminal Matters Act applies[13]. Such agreements, of which none currently exist, could be used to extend mutual legal assistance beyond cartel cases and to provide legal assistance, such as evidence gathering assistance, to jurisdictions in which cartels are not treated as criminal conduct.

The German Bundeskartellamt reports that the latest revision to the law on restrictions of competition (*Gesetz über Wettbewerbsbeschränkungen*), includes not only provisions implementing article 12(1) of EU Regulation 1/2003, which allows wide co-operation between the agencies which are members of the European Competition Network[14], but also extending the terms of that article to co-operation with competition agencies of jurisdictions outside the EU. Concretely, § 50 a Sec. 1 of the law states as follows:

> *In accordance with Article 12 (1) of Council Regulation (EC) No. 1/2003 and for the purpose of applying Articles 81 and 82 of the Treaty Establishing the European Community, the competition authority has the power to disclose any matter of fact or of law to the European Commission and the competition authorities of other Member States and to supply the respective documents and data. This data may include confidential information, in particular trade and business secrets. In return, the competition authority has the power to*

[13] See section III.4 below on Mutual Legal Assistance Treaties.
[14] See section III.4 below on Mutual Legal Assistance Treaties.

request and receive such information from other competition authorities and to use it in evidence. Section 50 (2) shall apply mutatis mutandis[15].

The following article in the law, § 50 b Sec. 1, extends the terms of section 1 to non-EU competition agencies, in the following terms:

The powers mentioned in § 50a (1) are also awarded to the Bundeskartellamt in other cases where it cooperates with the European Commission or competition authorities of other states for the purpose of applying competition law.

However, given that the revised law only entered into force late in 2005, there are as yet no examples of the implementation of these provisions with agencies outside the EU. Moreover, it should be emphasised that the provisions only apply to information already in the possession of the Bundeskartellamt, not to obtaining information on behalf of other agencies. Such co-operation relies on a different German law, the Law on international Co-operation in Criminal Matters (*Gesetz über internationale Rechtshilfe in Strafsachen*). This law has been applied once over the last three years, when a foreign jurisdiction requested Germany to deliver a summons to appear as a witness.

The Romanian Competition Council reported that '*in accordance with the provisions of the Romanian Competition Law, Competition Council represents Romania and promotes exchange of information and of experience in the relations with specialised international organisations and institutions and co-operates with international and communautaire competition institutions'.* Two concrete examples of such co-operation are mentioned by Romania, both involving exchange of general market information, not evidence used in the cases in question.

The United Kingdom may, under section 243(2) of the Enterprise Act, disclose to an overseas public authority information which it has obtained by using its statutory powers of investigation, in order to facilitate the exercise by the overseas agency of any function relating to the prosecution of crime, including cartels.[16]

Regarding the USA, the 1994 International Antitrust Enforcement Assistance Act (IAEAA) authorises the competition authorities (Department of Justice and Federal Trade Commission) to conclude antitrust mutual assistance agreements on the basis of which assistance can be provided to foreign authorities and information can be exchanged. Under an IAEAA agreement, the competition agencies of the USA and another jurisdiction can exchange evidence on a reciprocal basis for use in antitrust enforcement, and assist each other in obtaining evidence located in the other's country, while assuring that confidential information will be protected. IAEAA agreements require the reciprocal commitments of the foreign jurisdiction involved[17]. Because such authority is not common under domestic confidentiality provisions, the USA has only concluded one such agreement to date, with Australia[18]. Unlike the Canadian, German, and UK statutes quoted above, the IAEAA does not itself directly authorise co-operation with other jurisdictions in the absence of an agreement to that effect.

Australia has adopted two legal acts which can act as a basis for co-operation agreements: the Mutual Assistance in Business Regulation Act enabling the collection of information at the request of foreign authorities, and the Australian Mutual Assistance in Criminal Matters Act. The first act may be referred to only in relation to civil breaches of antitrust laws, whereas under the second one a foreign country can request the provision of evidence, information, and documents, and ask for assistance in relation to a criminal proceeding in that foreign jurisdiction. Thus the referral to both acts is necessary in cases where breaches of foreign antitrust law can involve civil and criminal sanctions.[19] New Zealand is also planning shortly to introduce a Bill authorising the New Zealand Commerce Commission to enter into agreements which allow the exchange of confidential information.

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[15] Section 50(2) describes the limitations to the uses to which exchanged information can be put. See section III.6. below.

[16] The UK has criminal sanctions against cartels.

[17] Specific requirements include: the agreement must provide for the reciprocal exchange of information; the confidentiality laws in application in the foreign jurisdiction must provide protection at least as strong as that provided under US antitrust law, and any information exchanged must be returned once the proceedings are over.

[18] See section III.5. below.

[19] These Acts are the legal bases in Australia for the US-Australia Antitrust Mutual Enforcement Assistance Agreement (AMEAA). See section III.5. below.

In their reply to the questionnaire, none of the competition agencies provides details of co-operation with other agencies under the terms of the national laws in question, either because they entered into force too recently, or because the provisions of the laws are not applied independently of other co-operation provisions (and therefore the cases of co-operation are classified under the other instrument in question in their replies to the questionnaire). No evaluation of this instrument of co-operation is given, and no difficulties in applying it are reported.

4. Co-operation based on non-competition-specific agreements and instruments

This section deals essentially with Mutual Legal Assistance Treaties, and to a lesser extent with letters rogatory. It does not cover in any detail co-operation based on competition provisions contained in Free Trade Agreements (FTAs) between jurisdictions, although they might fall within the definition of non-competition-specific agreements, and many such FTAs with competition provisions exist, simply because very few of the respondents replying to the questionnaire reported any examples of co-operation based on the competition provisions in FTAs, and FTAs therefore seem to have played a limited role in co-operation between agencies in cartel cases[20]. In fact, only one agency reported specific examples of co-operation in cartel cases with other jurisdictions under the competition provisions of a broad-ranging FTA or similar agreement[21]. It should also be noted in this context that another responding agency reported having made an unsuccessful approach to a foreign jurisdiction with which it has an FTA including competition co-operation provisions, for co-operation in a cartel case; however confidentiality requirements prevented the other jurisdiction from responding positively to the request.

Turning to Mutual Legal Assistance Treaties (MLATs), these are treaties on co-operation in criminal matters which create hard law obligations on signatories; they oblige the parties to assist each other by obtaining evidence located on the requested jurisdiction's territory for the purposes of the law enforcement investigations of the requesting jurisdiction. The requested jurisdiction is not usually able to refuse completely to lend its aid except if the offence is political or military, or if complying with the request will prejudice its sovereignty or essential interests or interfere with its own criminal investigations. Although details vary, a typical MLAT can provide for:

1) taking testimony and statements in the requested jurisdiction;

2) serving process;

3) providing documents or records located in the requested jurisdiction;

4) executing requests for searches and seizure;

5) in some cases, giving any other form of assistance 'not prohibited by the law of the requested jurisdiction' or 'consistent with the objects of the treaty'.

A significant number of bilateral (and a few multilateral) MLATs exist[22], but not all MLATs can be used by competition agencies for co-operation in cartel cases. Many pairs of jurisdictions do not have an MLAT in force between them, and in other cases MLATs cannot be used for co-operation in cartel cases, either because of an explicit exclusion for competition policy (as in the current USA-Switzerland MLAT, for example, or the Canada-Germany MLAT), or because there is a requirement of criminal status for cartel offences in both jurisdictions, which is not met in one or both cases. It is however noteworthy that sometimes dual criminality is not a requirement for the application of MLATs, thus their use might in theory be extended into the area of competition law enforcement even if only one of the parties to the agreement is a criminal jurisdiction as regards competition law. For example, the US-Spain and US-Italy MLATs theoretically may also be used in antitrust cases as they do not include the requirement of dual criminality. However, in cases where there is no dual criminality some means of co-operation may be unavailable to the parties. An exclusion for competition matters in the UK-US MLAT was removed in 2001.

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[20] FTAs may be the basis for co-operation in other types of competition cases, but that falls outside the scope of the questionnaire and of this report.

[21] However, that agency did report 12 instances of co-operation over the last 3 years, with 4 other agencies.

[22] For example, the USA alone has well over 50 bilateral MLATS with other jurisdictions.

MLATs normally oblige the parties to assist each other by obtaining evidence located on the requested jurisdiction's territory at the request of the other jurisdiction for the benefit of its law enforcement investigations. The requested jurisdiction is not usually able to refuse completely to lend its aid. However MLATs normally identify circumstances under which a requested jurisdiction may, in its discretion, refuse assistance. Generally, a requested jurisdiction may refuse when such assistance:

- Would impair its sovereignty, security or essential interests,
- Would be contrary to its important public policy or essential interests,
- Is related to an offence political in nature,
- Is related to an offence under military, but not criminal, law,
- Relates to an offender who could not be proceeded against in the requested jurisdiction because of previous acquittal or conviction for the offence.

Regarding the replies to the questionnaire on the use of MLATs, six agencies reported having MLATs with other jurisdictions which can be or potentially could be used for cartel cases: the agencies of Australia, Brazil, Canada, Israel, Switzerland and the USA[23]. Of those six agencies, one had not experienced use of the MLAT(s) in question in cartel cases, while the other five had experienced some use of them. The number of cartel cases reported over the last three years in which MLATs had been used ranged from one to five (one agency did not communicate the number of cases). Only three agencies reported the number of other jurisdictions with which MLATs have been used in cartel cases; the answer was one other jurisdiction in all three cases (including obviously the two agencies which only reported one instance of MLATs being used). Two agencies did not provide this information.

Only two replies provided any information about the stage of the investigation at which an MLAT was used. One agency (which had only used an MLAT in one cartel case) reported that it had used the MLAT to request information from another jurisdiction at a pre-investigative stage. A second agency reported having used MLATs at both the pre-investigatory and investigatory stages, and having both requested assistance from another jurisdiction and having received requests.

Only one agency commented on any difficulties encountered, and this was a general comment not specific to MLATs. That agency commented that requests for co-operation using formal co-operation instruments are often slowed down by legal challenges by the parties under investigation. Of the five agencies which have experience in the use of MLATs in cartel cases, three reported that MLATs 'add value' or provide access to kinds of information which cannot be accessed via other means of co-operation, while two agencies found it too early in their experience with MLATs to reach conclusions.

These replies can be complemented with some indications received at the 2005 ICN cartels workshop in Seoul, which included a session on co-operation using such instruments. It was emphasised there that the specific details and procedures of co-operation under MLATs can depend on requirements of both the requesting and the requested jurisdiction. For example, the law of some jurisdictions requires that evidence gathered by another jurisdiction pursuant to such instruments, in order to be valid in court, needs to be gathered respecting the rights of defence applied in the requesting jurisdiction (such as the presence of a lawyer). In other cases, certain investigatory methods available to the requesting jurisdiction may not be available to the requested jurisdiction (for example, interception of private communications). Another agency pointed out that all legal proceedings in its jurisdiction are public, so that any evidence which it may gather pursuant to a request received from another jurisdiction will inevitably be made public. The length of proceedings can be an issue, as in some cases two separate Court decisions can be necessary in order to effect a co-operation request: firstly a search warrant, and secondly Court authorisation to send the information gathered to the requesting jurisdiction.

Regarding letters rogatory, their nature and general uses can be summarised by this quote from the 'United States Attorneys' Manual':

[23] Some other jurisdictions whose competition agencies did not reply to the questionnaire also have such MLATs in force, for example the United Kingdom. The German Bundeskartellamt reported that although MLATs currently in force between Germany and other jurisdictions exclude competition matters, an MLAT between Germany and the USA which does permit co-operation in cartel cases will shortly enter into force.

> *Letters rogatory are the customary method of obtaining assistance from abroad in the absence of a treaty or executive agreement. A letter rogatory is a request from a judge in the United States to the judiciary of a foreign country requesting the performance of an act which, if done without the sanction of the foreign court, would constitute a violation of that country's sovereignty. Prosecutors should assume that the process will take a year or more. Letters rogatory are customarily transmitted via the diplomatic channel, a time-consuming means of transmission. The time involved may be shortened by transmitting a copy of the request through Interpol, or through some other more direct route, but even in urgent cases the request may take over a month to execute.*[24]

As for the replies to the questionnaires on letters rogatory, eight agencies reported having access to this instrument for potential co-operation in cartel cases[25]. Only two of the agencies reported any experience with the use of letters rogatory, and one of those two agencies did not provide any further specifics. The other agency reported five instances of the use of letters rogatory over the last three years; in all cases it was the recipient of a request for assistance, the five requests originated in five different other jurisdictions, and in all cases only general information, not evidence, was provided. This leaves open the possibility that several competition agencies which did not respond to the questionnaire have made use of letters rogatory in cartel cases over the last three years. One of the two agencies commented that letters rogatory 'are very useful in that they allow authorities to obtain specific evidence, such as documents or testimony'; the other did not comment. No particular difficulties were reported.

5. Co-operation based on competition-specific agreements between jurisdictions (including first and second generation agreements)

Since 1976, when the first bilateral dedicated competition agreement (covering competition only, no other subjects) was signed between the United States of America and Germany, competition co-operation agreements have proliferated[26]. The great majority, if not all, such agreements are inspired in large part by the successive OECD Recommendations on co-operation between competition agencies, of which the latest and most detailed dates from 1995[27].

Although the details vary, all of these bilateral agreements have similar structure and provisions, following the structure of forms of co-operation established in the 1995 OECD Recommendation:

1) The notification by the competition authority of one contracting party to that of the other party when important interests of that other party may be affected by enforcement or other activity taken in the notifying jurisdiction.

2) The coordination of parallel investigations where 'appropriate and practicable'.

3) The sharing of information in order to permit the party whose interests are affected to comment and consult the notifying party.

4) Consultations aimed at developing or applying mutually satisfactory and beneficial measures for dealing with anticompetitive practices that affect international trade.

5) The supply of relevant information on anticompetitive activity, subject to national confidentiality laws.

6) The use of the principle of negative comity.

7) The use of the principle of positive comity.

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[24] Title 9 (Criminal Resource Manual), Section 275. Available at: http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00275.htm. The following section (276) notes that MLATs are 'generally faster and more reliable than letters rogatory'. On the other hand, letters rogatory can be used in both civil and criminal matters.

[25] The agencies of Australia, Brazil, Canada, Germany, Hungary, Jamaica, Japan, and the USA.

[26] All such agreements are bilateral, except for a trilateral agreement between Australia, Canada and New Zealand. The USA is now a party to eight such agreements, Canada to eight, Australia to five, Japan to three, and the EU to three. For information on dedicated competition agreements and their contents, see bibliography items 8 and 42 in annex 3.

[27] Bibliography at annex 3, item 36.

Bilateral agreements based on the OECD Recommendation are arrangements which express the willingness of the contracting parties to cooperate on competition-related issues. However, in almost all cases, they include a clause allowing an agency to decline to communicate information if it is protected by confidentiality provisions in national law. Nevertheless, the significance of such agreements to the establishment and implementation of agency-to-agency co-operation is indisputable.

The type of agreement described above is a 'first generation' agreement. 'Second generation' competition agreements are defined as those which allow the exchange of 'confidential information' between the agencies. However only one example of a second generation agreement in force exists, namely the Antitrust Mutual Enforcement Assistance Agreement (AMEAA) signed between the US and Australia in 1999[28]. The AMEAA provides for reciprocal enforcement assistance including requiring the obtaining of documents and taking testimonies for the use of requesting authority in its own enforcement investigations. The forms of assistance under the AMEAA include: 1) disclosing, exchanging and discussing information or evidence in the possession of an antitrust authority; 2) taking of individual testimonies; 3) obtaining documents; 4) executing searches and seizures. The parties may not refuse to share information with the exception of cases when such assistance would not be permitted by law or be against the public interest. Although this section also covers the AMEAA, for reasons of sensitivity, it is not possible to distinguish that agreement from other competition agreements, as concerns the information on co-operation provided in this section.

In the questionnaire carried out for this report, thirteen agencies in the sample reported being a party to bilateral competition agreements with one or more other jurisdictions or agencies[29]. Of these thirteen agencies, eight reported examples of co-operation in the cartel field with other agencies pursuant to bilateral competition agreements over the last three years. Where agencies were able to specify the other agency/jurisdiction with which the co-operation took place, this was always with another of the same group of nine agencies. The number of cases over the last three years reported per agency ranged from one to over 20. The number of other agencies with which an agency reported having co-operated over the last three years pursuant to a competition-specific agreement ranged from one to eight. Two of the eight agencies reported that some of their bilateral competition agreements with other agencies had not given rise to any co-operation in the cartel field, while some of their other agreements had given rise to co-operation. Apart from these nine agencies, two further agencies which responded to the questionnaire reported having bilateral competition-specific co-operation agreements with one or more other agencies/jurisdictions, but which had never been used in cartel cases.

As to the type of co-operation involved, and the phase of the investigation, all three phases of investigation (pre-investigatory, investigatory, and post-investigatory phases) have been concerned by this type of co-operation, with a slight predominance for co-operation at the investigatory phase (such as the organisation of co-ordinated searches, raids or inspections). Post-investigatory co-operation was slightly rarer, probably due to the fact that most such competition-specific agreements do not allow the exchange of 'confidential information', thus limiting the possibilities of exchanging information, even following co-ordinated searches, raids or inspections. Specific examples of the types of co-operation at each phase of the investigation reported in the replies to the questionnaire are the following:

Pre-investigatory phase:

- notifications from one competition agency to another of a possible cartel affecting its jurisdiction;
- general discussions between competition agencies regarding the value of particular witnesses;
- assistance from one competition agency in putting another agency in contact with complainants in its jurisdiction regarding possible cartel offences.

Investigatory phase:

- exchange of information regarding the focus of the case for each agency;

[28] This agreement is of particular interest, as being between jurisdictions with differing sanctions (the USA applying criminal sanctions including incarceration, while Australia, at the time of writing in January 2006 has only ever applied administrative sanctions, although criminal sanctions are due to be introduced shortly).

[29] The competition agencies of Australia, Brazil, Canada, the EU, France, Germany, Israel, Japan, Mexico, New Zealand, Portugal, Romania, and the USA.

- coordination of searches, raids or inspections, document production orders and interviews;
- exchange of information regarding the theory of the case, the nature and period of the offence, investigative strategies, and value of potential witnesses;
- notifications of specific investigatory acts concerning the other jurisdiction (intent to interview witnesses, request for the production of documents etc.).

Post-investigatory phase:

- updates on such matters as the progress of the investigation, next steps and any legal proceedings;
- exchange of information regarding possible settlement and sanctions;
- exchange of information about approaches to settlements and sanctions in other jurisdictions and notification of guilty pleas and convictions involving individuals and companies from other jurisdictions.

As regards any difficulties which may have arisen regarding this kind of co-operation, the difficulties encountered included the following:

- inability of some jurisdictions to provide requested information as a result of limitations on the sharing of confidential information under their laws;
- lack of predictability in timing of the exchange of key information;
- where investigations in jurisdictions are at different stages, difficulties in coordination of investigative steps and sharing of information.

It should also be noted that a certain number of bilateral competition agreements between jurisdictions or agencies seem not to have been used in cartel cases. Furthermore, in some cases where agencies have built up a close working relationship, there is not necessarily need to make a formal reference to a bilateral co-operation agreement when requesting or offering co-operation. This reinforces the fact that many such agreements, while they provide a legal framework for co-operation, do not make any kind of co-operation possible, which is completely impossible in the absence of such an agreement, and often contain clauses which allow one agency to decline to co-operate with another agency if there are pressing reasons to do so (for example, linked to their national law regarding confidential information).

All nine agencies which reported examples of this kind of co-operation reported overall positive experiences and beneficial effects. Comments included:

- *'All the bilateral agreements [this jurisdiction] is a party to, are first generation agreements and, therefore only allow for the exchange of non-confidential information. Nonetheless, we think they may be indeed valuable tools, since they provide the parties with a clear framework to cooperate. In addition, it is important to note that 'non-confidential information' is a very broad category and may encompass certain types of data that so far have not been exchanged simply for lack of opportunity and/or because the parties to the agreement may need to establish closer ties before cooperating more freely;'*
- *'Overall, this type of co-operation was helpful in bringing to the [agency's] attention alleged offences in [its jurisdiction], identifying key companies and witnesses, providing opportunities to discuss case theories and strategies, and generally assisting in [the agency's] intelligence and evidence gathering efforts;'*
- *'This type of co-operation is more workable than that of soft law instruments in that the former has more mandatory and systematic scheme than the latter does.'*

6. Regional co-operation instruments - co-operation between EU member States within the European Competition Network under Regulation 1/2003

The only regional form of co-operation which will be examined in detail in this section is that within the European Union, between the members of the European Competition Network[30]. This is because, while other regional

[30] The source of this information is the DG Competition reply to the questionnaire and bibliography item 31.

groupings (such as CARICOM, COMESA, MERCOSUR etc.) have competition rules, there is no information available regarding co-operation in cartel cases between member countries[31].

However, one regional arrangement which should be mentioned before discussing the European Competition Network is the European Economic Area (EEA), which consists of the European Union plus Norway, Iceland and Liechtenstein. The agreement creating the EEA contains competition provisions identical to those in the EU Treaty. The EEA Agreement designates two competition authorities responsible for implementing its competition provisions, the European Commission and the EFTA Surveillance Authority (ESA); however those authorities will not deal concurrently with the same case, it will always be allocated to one or the other. Each of them can request the other to organise surprise searches, raids or inspections on their respective territory (and send members of staff to participate in the searches, raids or inspections). It is a logical consequence of this fact that the exchange of 'confidential information' between the European Commission and the ESA is also possible. There are no formalised relations between the European Commission and the competition authorities of Norway, Iceland and Liechtenstein. The European Commission's only interlocutor in competition matters for those countries is the ESA. The ESA and the national authorities of Norway, Iceland and Liechtenstein are however not members of the European Competition Network (ECN).

The ECN, consisting of the competition agencies of the EU member States and the European Commission, is unique in that a large number of agencies co-operate to apply the same competition rules, with detailed provisions on co-operation between them in application. These rules have been in force since 1 May 2004, when the EU's new anti-trust procedural regulation (Regulation 1/2003, known as the 'modernisation Regulation') entered into force. In what follows it should however be borne in mind that while co-operation between ECN member agencies is indeed 'co-operation between ICN member agencies' (since all ECN members are also ICN members), it is co-operation between jurisdictions applying the same competition rules, namely those in the EU Treaty.

Under Regulation 1/2003, certain forms of co-operation are obligatory and therefore applied systematically. Other forms are available to the agencies for use as appropriate. The Regulation empowers all ECN members to exchange information, including confidential information, for the purpose of applying the EC competition rules. Co-operation can take place at the pre-investigatory, investigatory and post-investigatory phases. No particular procedures are laid down; co-operation takes place directly between agencies, with no parties external to the agencies being involved.

As regards pre-investigation co-operation, there is an information obligation on new cases. This involves all ECN members informing each other about investigations where EC law is applied before or immediately after commencing the first investigative measure (Article 11(3)[32]). In practice, this is done by uploading a standard form on the common case-management system. In cartel cases, where surprise searches, raids or inspections are planned, this type of information can typically be provided immediately after the inspection. Co-operation mechanisms have also been put in place to ensure that concerned authorities are informed before an inspection is carried out, in order to allow them to coordinate and if need be, to organise simultaneous searches, raids or inspections.

At the investigatory stage, the Commission, before conducting an inspection, is obliged to inform the national competition authority or authorities (NCAs) of the Member State(s) in whose territory the inspection is foreseen. In turn, NCAs are obliged to grant assistance to the Commission during the inspection, in particular in case undertakings oppose the inspection. If such assistance requires prior judicial authorisation, it can be applied for as a precautionary measure. In practice, NCAs apply for required authorisations before the inspection takes place. During the actual inspection, NCA officials actively assist the Commission inspectors, and have the same powers as the Commission's inspectors. Where the Commission inspectors find that an undertaking opposes the inspection, the Member State concerned is further obliged to provide the necessary assistance by police or similar enforcement authorities to enable the Commission inspectors to carry out their inspection.

However, instead of conducting an inspection itself, with the co-operation of a national competition authority, the Commission may equally request an NCA to carry out an inspection entirely on its behalf. Furthermore,

[31] The reply from the Portuguese competition agency reports a project for the creation of a Lusophone competition network.
[32] All Articles referred to are those of Regulation 1/2003, unless otherwise indicated.

NCAs can request other NCAs to undertake fact-finding measures, including searches, raids or inspections, in the other authority's territory on behalf and for the account of the requesting authority.

Concerning information exchange, article 12 of Regulation 1/2003 allows the ECN members to exchange information, including confidential information, with each other without the consent of the parties and, if the legal requirements are met, to use this information in evidence (see below). This is a key feature of Regulation 1/2003, and considerably enhances the power of EU competition authorities to deal with cartels, as compared with the situation prior to 1/5/2004. Information exchange can take place at all stages of the handling of a cartel case; it is particularly important following searches, raids or inspections. In particular, where another national competition authority has been requested to carry out an inspection, the information gathered can be exchanged on this basis.

Information exchanged between ECN members may be used directly in evidence, if certain legal requirements are fulfilled. In particular, information exchanged shall only be used in evidence for the purpose of applying the EU competition rules and in respect of the subject-matter for which it was collected by the transmitting authority.

Post-investigation co-operation between ECN members includes:

- *Coordination of case handling.* While each authority remains responsible for its own proceedings, there is no obstacle to ECN members coordinating the post-investigatory handling of a cartel case. Where NCAs deal with a case in parallel action, ECN members endeavour to coordinate their action to the extent possible[33].
- *Information about envisaged decisions.* No later than 30 days before adopting an enforcement decision based on the EC competition rules, the NCAs inform the Commission of their envisaged decision. The Commission thus has the possibility to make observations on NCA decisions.
- *Consultation of the Advisory Committee by the Commission.* The Commission in turn is obliged, before adopting a decision ordering an infringement to be ended and/or imposing fines, to consult an Advisory Committee, composed of representatives of the NCAs. The latter may make observations and take position on the Commission decision in regard of the substantive assessment of the case as well as on the amount of fines imposed.

With regard to the experience of co-operation between ECN member agencies under the terms of Regulation 1/2003, it should be remembered, first of all that the ECN was only created on 1 May 2004, and secondly, that only six competition agencies of EU member states[34], and DG Competition of the European Commission filled in the questionnaire on co-operation. Five of the six national agencies reported assisting the Commission with searches, raids or inspections on their national territory, and all of them reported at least one case of co-operation with other NCAs within the ECN. Three of the agencies reported only co-operation with other ECN member agencies (no co-operation with agencies outside the ECN). The number of such instances of co-operation reported were one, one, three, seven, eight and 'about a dozen'. Examples of the kinds of co-operation cited include 'co-ordination of searches, raids or inspections and exchange of the information obtained, including confidential information', and 'assistance with interviewing companies situated on a different national territory'.

With regard to the outstanding issues regarding co-operation within the ECN, the main ones are linked to exchange of information between ECN member agencies against a background of differing sanctions and leniency programmes:

- regarding differences in sanctions, some ECN member jurisdictions have sanctions against undertakings only, while others also have sanctions against individuals, and of those which have sanctions against individuals, some have custodial and others only financial sanctions. While these differences do not prevent the exchange of any information between ECN member agencies, they do impact on the uses to which information exchanged can be put, since there are stricter procedural safeguards where sanctions, particularly custodial sanctions, can be applied to individuals. Regulation 1/2003 provides that information exchanged can only be used in evidence to impose sanctions on natural persons when the law of the transmitting authority foresees sanctions of a similar kind in relation to infringements of the EC competition rules or, in

[33] See Commission Notice on the Co-operation within the Network of Competition Authorities (bibliography at annex 3, item 31), para 13.
[34] The competition agencies of Belgium, France, Germany, Hungary, the Netherlands and Portugal.

the absence thereof, the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this latter case, information exchanged between EU competition authorities cannot be used to impose custodial sanctions. Where the requirements for use in evidence are not met, information exchanged can generally be used as intelligence.

- Although most EU member States have a leniency programme, not all do[35], and among those that do, the conditions can vary. With regard to leniency-related information[36], the ECN member agencies have agreed that when such information is submitted in accordance with the information obligations under Regulation 1/2003, it cannot be used to start an investigation.[37] Moreover, where such information is exchanged under the provisions regarding voluntary exchange of information, it cannot be used without the leniency applicant's consent to sanction any legal or natural person covered by the leniency decision. Absent the applicant's consent, an ECN member agency can only submit such information to another ECN member agency if the latter has also received the same leniency application or if the latter makes a written commitment not to use the information to impose sanctions on the applicant. These rules apply even if the receiving jurisdiction does not have a leniency programme itself or if the undertaking in question would not qualify for immunity/amnesty due to differences in the programmes. Such an understanding is necessary in order to prevent potential immunity/amnesty applicants in one EU jurisdiction being deterred from applying by the possibility of sanctions in another EU jurisdiction based on information supplied by the agency to which the immunity application was made. A Working Group in the ECN is working on steps towards greater convergence and co-ordination between leniency programmes within the EU.

Overall, experiences with the ECN are very positive, with one agency favourably comparing the situation since the entry into force of Regulation 1/2003 with that existing beforehand, when co-operation with agencies of other EU member states was longer and more complicated, having to pass via judicial bodies outside the competition agency.

[35] Twenty out of twenty-five EU member States have a leniency programme.

[36] The term leniency-related information covers not only the leniency application itself, but all information that has been collected using fact-finding measures that could not have been undertaken in the absence of the leniency application.

[37] The special safeguards for leniency-related information have been regulated in the Commission Notice on co-operation within the Network of Competition Authorities. Since the Notice is as such only binding on the Commission, the other ECN member agencies have signed a statement whereby they commit themselves to comply with the principles in the Notice. Only those agencies that have signed the statement will receive information on leniency cases. DG Competition publishes a list of the authorities that have signed it on its website (www.europa.eu.int/comm/competition).

IV. ISSUES AND PROBLEMS ARISING

This section is based, not only on the responses to the questionnaires, but also on remarks made at ICN Cartel Workshops, published material, and discussions with cartel enforcers about their experience. The following issues seem to be the main ones which have arisen with regard to co-operation between competition agencies in cartel cases:

- *Complexity and duration of certain co-operation procedures*

  Some types of co-operation instrument are procedurally complex, and time-consuming, with ample opportunities for the parties under investigation to delay matters. For example, certain types of co-operation (particularly letters rogatory and MLATs) are not agency to agency co-operation, and require detailed formal requests to be transmitted via the judicial authorities of both jurisdictions, and/or diplomatic channels. A court order or warrant is normally required for investigatory acts on behalf of the requesting jurisdiction involving compulsion, such as searches, raids or inspections or the sending of subpoenas. In some cases a second court order may be required in order to authorise the communication of the evidence gathered to the requesting jurisdiction. These court orders can normally be challenged or appealed by the parties under investigation. The use of such instruments can also be human-resource-intensive for both jurisdictions, and the financial cost can be heavy. In many cases, a period of well over a year can elapse between the sending of a co-operation request and receipt of the requested information. In such cases preliminary co-operative action to prevent the destruction of evidence may be necessary, thus adding extra stages to the process.

- *Absence of waivers of confidentiality*

  The granting of waivers of confidentiality by immunity/amnesty applicants is within the discretion of the applicant in question, and cannot be required by a competition agency. Generally, an immunity/amnesty applicant is not required to disclose in which other jurisdictions it has made an application. If a waiver is not granted rapidly, time may be lost in trying to persuade the applicant to grant a waiver, and the waiver may be granted at a later stage in the investigation, when the information in the application is already less useful to other agencies. One agency has reported an example of an immunity/amnesty applicant in two jurisdictions declining to grant a waiver. Waivers are one of the most useful means to facilitate co-operation between competition agencies in cartel cases at the moment. It can be that the lack of a waiver is justified however. Lack of co-ordination of leniency programmes may be a factor: not only does an agency with no leniency programme normally exclude itself from this type of co-operation[38], but where the criteria for granting immunity/amnesty are different, this may also discourage the granting of waivers, as an undertaking may have to submit more information in one jurisdiction than in another in order to benefit from the respective leniency programmes, and may not want this additional information to be revealed to other agencies with less demanding leniency programmes.

- *The use of some types of co-operation instrument is not open to every agency*

  The only category of co-operation which is universally available for use between any two competition agencies is informal co-operation. Letters rogatory are also available in a great many cases, but being the most burdensome form of co-operation, they tend to be used only as a last resort. Bilateral competition-specific agreements are becoming more and more common, including between long-established competition jurisdictions and younger ones, but they are by no means universal, and their negotiation may be too human-resource intensive for some agencies. Only one example of a 'second-generation agreement' (permitting the exchange of 'confidential' information) exists. Only a limited number of agencies have access to MLATs for use in cartel cases because of the varying legal status of cartel offences in different jurisdictions.

- *Barriers related to 'confidential information'*

  Agencies are often prevented by their own national laws from sharing certain types of information in their possession with other jurisdictions. These types of information are conveniently categorised as 'confidential information', although definitions of such information in national laws vary, and some national laws do not define them in a precise way. It may therefore be more helpful to think rather of varying degrees of self-imposed restrictions

[38] Unless it is a party to an agreement on sharing of information from leniency applications similar to that between member agencies of the European Competition Network. See section III.6. above.

on sharing information obtained from parties under investigation. The questionnaire revealed specific instances where agencies were unable to respond positively to requests for co-operation from other agencies for this reason. In some jurisdictions the undertakings involved may be able to categorise information as 'confidential', with a burden on the agency wishing to share the information with another jurisdiction to demonstrate in Court that the information is not 'confidential', which can be very time-consuming. It could be questioned whether information which a company has already shared with its direct competitors should ever be qualified as 'confidential' and thus not to be shared between enforcers. In other cases, a vague definition of 'confidential information' can lead to uncertainty and a cautious approach in sharing information between jurisdictions. Or a wide definition of 'confidential' can virtually rule out the exchange of any information originating from a company or obtained under compulsion. Variations in the definition of 'confidential information' between jurisdictions may mean that similar pieces of information can be shared by some agencies but not by others.

- *Limitations on admissibility as evidence of information exchanged*

  Some types of information may be exchanged between certain agencies, pursuant to co-operation agreements or other provisions, but not used in evidence. This can essentially be for one of two reasons. Firstly, a court in the jurisdiction receiving the information might not accept it, or a court in the sending jurisdiction might not approve of its exchange, essentially because the conditions in which it was gathered in the sending jurisdiction do not meet the requirements applied in the jurisdiction where the legal proceedings are taking place[39]. An example might be where the sending jurisdiction does not have sanctions against individuals and therefore no right for individuals to refuse to incriminate themselves, while the receiving jurisdiction does have such sanctions and such a right for individuals. In such a case, a court in the receiving jurisdiction may not accept evidence obtained via self-incrimination in order to convict an individual. However, some jurisdictions accept in evidence any information which was validly collected under the laws of the sending jurisdiction, even if under their own laws, the information would have been considered as having been collected in violation of individual rights such as the right not to incriminate oneself. Secondly, the agreement or legal provision on which the co-operation is based might itself limit the uses to which the exchanged information is put. An example of this is the limitation on the use of information exchanged within the European Competition network for the imposition of custodial sanctions, discussed above[40].

- *Risk to the integrity of the investigation(s) of the receiving jurisdiction*

  It is possible that a request for co-operation will lead to the sending of information of a type which would not only be inadmissible in evidence in the receiving jurisdiction, but which would be privileged in the receiving jurisdiction, for example if the receiving jurisdiction recognises legal professional privilege while the sending jurisdiction does not. If the case team in the agency which is investigating the case sees such information, this may constitute grounds for a court in the receiving jurisdiction to reject or overturn the case entirely on grounds of procedural abuses. While this risk can be fairly simply be averted via the use of a 'taint team'[41] to sift and filter the information received before it is transmitted to the case team (such as the case in the USA), this is very human-resource intensive, and may not be an option for smaller agencies.

- *Hindrances to exchange of 'agency information'*

  Exchange of 'agency information' is a significant aspect of co-operation in cartel cases, but this can be hampered by a lack of understanding on both sides of how such information can and can not be used. Agencies tend to exchange such information primarily or exclusively with agencies with which they have built up a working relationship of trust over time, and agencies which are relatively new to anti-cartel activity may find a reluctance among established agencies to disclose agency information due to concerns as to the uses to which the information may be put. Different agencies may take different approaches to the exchange of 'agency information', imposing different conditions on how it can be used in the other agency, creating confusion among agencies which are potential beneficiaries of the information. The absence of clear agreed 'groundrules' for the exchange of such information could be an obstacle to more widespread co-operation of this type.

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[39] One example of a court rejecting such exchanged evidence is reported in one reply to the questionnaires, but it may well be that such inadmissible evidence is either not exchanged at all or excluded from the investigation in the receiving jurisdiction by a 'taint team' (see the next bullet point on integrity of investigations)

[40] Section III.6.

[41] A 'taint team' is a team of officials other than the case team, who sift documents and information received from another jurisdiction and only pass on to the case team those which they have the right to see without compromising the integrity of the proceedings.

V. PHASE II OF THE PROJECT: POSSIBLE WAYS TO IMPROVE COOPERATION

Leniency and co-operation

The questionnaire referred to above was sent to twenty-six private practitioners. They were asked if clients envisaging multiple immunity/amnesty applications in different jurisdictions had, in their experience, decided not to apply in all of the jurisdictions in question, or not inform all the agencies of other jurisdictions in which they had applied, or declined to grant waivers of confidentiality, and explanations of these decisions were requested. Only nine replies were received [42], and some of them were brief. Therefore generalisations on the basis of the replies are impossible. A few points can nevertheless be made:

- In some cases a company involved in an international cartel will apply for immunity and amnesty in some jurisdictions but not others, despite the existence in those other jurisdictions of a leniency programme. This can be for reasons such as serious uncertainty as to whether conditional immunity will be granted, doubt that the agency will have the resources or access to the evidence to prosecute the cartel, and low levels of fines which are outweighed by the costs of applying for immunity/amnesty and ongoing co-operation. Clearly, the absence of an immunity/amnesty application will preclude an agency from co-operating with other agencies on the basis of a waiver;
- Applications are not necessarily submitted simultaneously, as resources are often devoted to preparing applications for one or a few large jurisdictions, with high sanctions, and well-established leniency programmes, and only applied later to preparing applications for other jurisdictions;
- There was a widespread view that clients would definitely not grant waivers, and in most cases not inform an agency of the other jurisdictions in which they had made applications, before the granting of conditional immunity by that agency.

Certain specific comments of interest regarding waivers included the following:

- "The agencies should think about a sort of sliding scale of waivers given the discovery and privilege issues associated with the sharing of information even between agencies only. In a first step, agencies might ask for a waiver limited to allowing them to coordinate their investigation (i.e. in particular their dawn raids). In a second step, agencies might be granted a waiver for exchanging orally information "on substance". In a third step, a waiver might then allow for an exchange of documents submitted to each of the agencies concerned."
- "One other reason for not granting a waiver was the desire to fully control information flow, also in light of potential third party damage claims later on, which might be facilitated due to different local document production rules."
- "The main problem encountered in the leniency application and co-operation is to ensure that the applicant does not expose himself further to private action risks particularly in the US."
- "If there are different pre-conditions for acquiring immunity (such as differences on termination timing or ringleader/coercion disqualification) that may lead to situations in which a waiver may be withheld so as to better control the information to the jurisdiction with the more stringent requirements."

Against this background, there are clearly a number of things which agencies might do in order to promoting the granting of waivers of confidentiality by applicants for immunity or amnesty. For example:

- More jurisdictions could adopt leniency programmes, thus gaining potential access to this form of co-operation, and of course, sanctions should be sufficiently high to make applying for immunity/amnesty worthwhile.

[42] Ivo Teixeira Gico Junior (Barbosa, Müssnich & Aragão, Brazil), Martin Low (MacMillan Binch, Canada), Helmut Bergmann (Freshfields, Germany), Tobias Klose (Freshfields, Germany), Dirk Schroeder (Cleary Gottlieb Steen & Hamilton, Germany), Kei Amemiya (Ito & Mitomi / Morrison Foerster, Japan), Andrew Peterson (Russell McVeagh, New Zealand), Philipp Zurkinden (Prager Dreifuss, Switzerland), Thomas Mueller (Wilmer Hale, USA).

- Convergence between leniency programmes would help, thus encouraging and facilitating multiple leniency applications (examples: ongoing co-operation requirement, termination of involvement in the cartel).
- Agencies could ask applicants to identify the other jurisdictions in which they have applied for immunity/amnesty.
- Immunity/amnesty applicants could be encouraged to grant waivers if they seem reluctant to do so (though they may be unlikely to do so before the granting of conditional immunity).
- Leniency applicants (who are not the first through the door and can benefit in jurisdictions which allow for less than total immunity), and others who gain benefit from co-operating with the agency but are not otherwise eligible for total immunity could also be encouraged to grant waivers.
- Individual informants or complainants might also be encouraged to share their information with agencies outside their jurisdiction.

Confidential information

The Anti-Cartel Enforcement Templates contain a question (8B) on the protection of business secrets (competitively sensitive information), although this question is asked in the context of protection of the rights of defendants, not that of co-operation with other agencies. The answers to those questions reveal a quasi-universal respect for the protection of confidential information, but rarely define the terms in detail nor provide a legal reference [43].

Certain jurisdictions have very precise legal definitions of what is confidential information, while in other jurisdictions the definition is based largely on case-law of the courts, and in others the definition is left to the agency. For example, the competition law of Vietnam contains an explicit definition of "business secrets" [44]. In Canada, section 29 of the Competition Act deals with the protection of confidential information [45]. In the EU, the definition of business secrets is determined by case law of the Court of Justice and repeated in a Notice of the European Commission on access to file [46]. In the U.S., the protections afforded during criminal cartel investigations to confidential information, such as business secrets, grand jury material, and amnesty information, are derived from various sources, including statutes, court orders, procedural rules, and the policies of the Antitrust Division of the Department of Justice.

Information considered as "confidential information" normally cannot be divulged nor exchanged with other competition agencies in the absence of an agreement explicitly authorising this. In some jurisdictions, however, laws on access to information may lay down principles of rights of access which may be in tension with a principle of protection of confidential information, and Courts must arbitrate between the different provisions. This is the case in Japan [47]. The ability of the Canadian Competition Bureau to exchange confidential information with other competition agencies, where this would further the administration or enforcement of the Canadian Competition Act, has been noted in chapter III.3. above.

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[43] The Anti-Cartel Enforcement Templates on the ICN web site, at: http://www.internationalcompetitionnetwork.org/index.php/en/publication/277 .

[44] Law n° 27-2004-QH11, article 2.10

[45] 1995 Bulletin on Communication of Confidential Information Under the Competition Act (see http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1277&lg=e). There, it is clarified that: "Section 29 provides specific protection from communication for certain types of information in the Commissioner's [Director's] possession, including the identity of any person from whom information was obtained pursuant to the Act, information obtained pursuant to the exercise of formal powers … The prohibition on communication of section 29 information does not apply where the information has already been made public … ". This section is also discussed in chapter III.3 above.

[46] "In so far as disclosure of information about an undertaking's business activity could result in a serious harm to the same undertaking, such information constitutes business secrets." " The category "other confidential information" includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking." Commission Notice on the rules for access to the Commission file, Official Journal C 325 , 22/12/2005.

[47] Article 39 of the Japanese Antimonopoly Act lays down an obligation on the JFTC not to leak information which the JFTC obtains in the course of its duties, while article 75-15 stipulates that any interested person may, after the hearing procedures have been initiated, request the JFTC for permission to peruse or copy the records of the case in question. A case on the extent of this right of access to file, and whether it covers confidential information on the file, is currently before the Supreme Court (Hakodate shinbun case).

Settlement procedures normally exist for cases of disagreement over the confidentiality status of a document: in many cases an agency cannot reveal information which is claimed to be confidential by a company, without undertaking a time-consuming procedure before a court to declare the information non-confidential (such a system of course encourages companies to make wide-ranging confidentiality claims for documents). Moreover, where a piece of information is incontestably confidential but is key evidence of an infringement, there are often procedures in place to allow it to be used as evidence (which normally requires it to be made public). Once a piece of information is de facto public it may be exchangeable with other agencies, depending on the applicable law.

Regarding information exchanged between cartel members, there is a question regarding the extent to which it can or should be considered as confidential. One point of view (mentioned above in chapter IV) is that it could be considered that competitively sensitive information shared with competitors without legitimate reason, should forfeit the status of confidential. Agencies which share this attitude might be willing, where this is not legally impossible in their jurisdiction, to attempt to push back the boundaries of what is considered as confidential and what is not.

Rights of defendants

Apart from the protection of "confidential information", the rights of parties in competition cases recognised in jurisdictions vary. Although recognition of the right not to incriminate oneself is very widespread, the right to non-self-incrimination is often applied in different ways in various jurisdictions.

As examples, EU caselaw recognises the right of companies not to admit an infringement but imposes on them an obligation to co-operate with investigations which includes providing evidence which can be used to prove an infringement [48], and also recognises the right of legal professional privilege for external legal counsel. In the US, the Fifth Amendment of the Constitution protects individuals, but not companies, from being compelled to incriminate themselves and the doctrine of attorney-client privilege protects certain communications between an attorney (both outside and in-house counsel) and client from disclosure. Similarly in Canada, individuals but not companies benefit from the right to non-self-incrimination, while legal professional privilege (solicitor-client privilege) applies to external and internal legal advice. In Switzerland, legal privilege applies in principle to external counsel but not internal counsel (though specific limited exceptions to this principle exist in both cases) [49]. In the Republic of Korea, the protection of individuals against testifying against themselves stems from the constitution, while legal professional privilege, although not having any legal basis, is recognised by the Korea Fair Trade Commission for external counsel and at KFTC discretion also for internal counsel. Japan recognises neither the right not to self-incriminate nor that of legal professional privilege

The OECD has done a lot of work examining exchange of information in cartel cases, especially with regard to the protection of rights of defence. The result of this is the 2005 Best Practices discussed in the introduction to this report [50], of which the most relevant parts are sections II.B.4 and II.C.1 and 2:

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

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

[48] The rights of individuals in EU competition proceedings have not been the subject of caselaw, given that there are no sanctions against individuals, but the right of non-self incrimination for human beings (not companies) is covered by article 6 of the European Convention of Human Rights.

[49] The right to non-self-incrimination in Switzerland applies in principle only to criminal law, and competition law is administrative law. However, given the maximum fine of 10% of turnover for cartels, the question of whether companies suspected of cartel activity should benefit from this right is under review.

[50] Annex 3 (bibliography), item 38.

C. Protection of Legal Profession Privilege

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

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

In seeking to put into effect any co-operation agreement or arrangements, agencies will need to put more detail on the principles outlined by the OECD, especially in cases where the rights of defence and legal systems differ (such as co-operation between jurisdictions with criminal sanctions against individuals and those with administrative sanctions against companies).

For example, the transmitting party could make sure that the information it sends could legally be used in its system and the receiving party, before making a specific use of the information in its proceedings, could make sure that the particular envisaged use of the information received can be made in its system. The purpose of such an arrangement would be to avoid that any jurisdiction should seek to interpret and apply foreign laws. If only a limited amount of key information were exchanged, then the number of documents which would need to be assessed would be small.

Facilitation of exchange of public and agency information

Public information and agency information [51] should be more widely exchanged, on the basis of agreed definitions and "groundrules". However, as has been noted, lack of clarity as to what can be exchanged, and on what conditions, can hinder such co-operation. It may be worthwhile for the ICN at some point in time to consider preparing some "guidelines for the exchange of information other than evidence" between competition agencies. This might include clear definitions as to what information normally can and cannot be exchanged between agencies in the absence of a specific co-operation agreement and/or authorisation from the parties, clarifications as to the uses to which it may be put and the conditions on which it may be exchanged, and the appropriate stages in investigations at which agency information might be discussed. It would have to be made clear in any such document that it cannot describe the situation of any particular agency, which might be legally empowered to exchange more, or less, information, or on different conditions. Therefore individual agencies could provide to other agencies their own statement of what they can and cannot exchange (this would not necessarily be a public document). A skeleton draft of such guidelines might look something like the following.

What can often be exchanged in the absence of a specific co-operation agreement and/or authorization from the parties:

- Any information which has already been published or otherwise made public;
- Information about the existence of an investigation in a specific sector (post-inspection);
- The stage of progress of any ongoing case (once investigation has started) and information on previous cases;
- Whether or not an immunity/amnesty application has been received;
- Whether or not conditional immunity/amnesty has been granted to the applicant;
- The provisional orientation of the agency in the case (moving towards a decision sanctioning the cartel or not);
- The methods applied in the jurisdiction with respect to the setting of fines and other penalties;
- The likely timing of any key steps in the case, including final decision.

[51] As referred to above, chapter III.1.

What cannot normally be exchanged in the absence of a specific co-operation agreement and/or authorization from the parties:

- The identities of the companies/individuals under investigation;
- The identity of any immunity/amnesty applicant;
- The contents of any immunity/amnesty application;
- Evidence obtained using investigatory powers;
- Information about specific pieces of evidence obtained (for example, memo from Mr X to Mr Y of date Z).

Conditions often imposed on the exchange of "agency information" by the agency providing the information:

- That the information not be divulged outside the receiving agency;
- That the information not be used for any purposes other than a cartel investigation in the sector in question.

VI. SUMMARY AND CONCLUSIONS

The stocktaking of co-operation in cartel cases carried out on phase one of this project revealed a significant range of co-operation between agencies, and importantly, an increasing number of agencies involved in co-operation, as certain agencies outside a traditional narrow group report instances of co-operation. Of twenty agencies answering the questionnaire, seventeen reported having co-operated in cartel cases.

Leaving aside regional co-operation within the European Competition Network, the most frequent type of co-operation reported was co-operation in the context of bilateral competition agreements (8 agencies), then waivers of confidentiality from immunity/amnesty applicants and informal co-operation (6 agencies for each of these types of co-operation), then non-competition-specific agreements such as MLATs (5 agencies); two agencies reported co-operation based on letters rogatory, and one reported co-operation based on a free trade agreement [52]. Where MLATs exist, they normally permit a deeper level of co-operation, such as only a second-generation dedicated competition agreement can achieve, but this advantage is constrained by the more complex procedures and the fact that this instrument is not available to all jurisdictions. Provisions in national law can facilitate co-operation, but in many cases such national law provisions must be used in conjunction with some kind of agreement, and do not directly permit co-operation (although in other cases national laws do directly authorise co-operation [53]).

The introduction of leniency programmes in more jurisdictions should be singled out as an increasingly important driver of co-operation between agencies, via waivers of confidentiality from immunity/amnesty applicants. However, it can happen that applicants refuse to grant such waivers, or to inform agencies of the other jurisdictions in which they have submitted applications for immunity/amnesty, although it should be emphasised that this occurrence seems to be exceptional.

Overall, it must be said that there is a complex patchwork of different types of co-operation and co-operation instruments, which is not conducive to efficiency or rapidity. Existing co-operation instruments are all useful up to a point, but all have disadvantages and none is of general usage (for all types of information, all phases of an investigation, between all types of agencies). Some kinds of co-operation are procedurally complex and time-consuming, and thus absorb an excessive number of man-hours in their application. Others are not open to all agencies. Self-imposed limitations by jurisdictions on what information their competition agencies can share with foreign agencies is one of the major problems. Linked to this, but a distinct issue, are fears by agencies that sending or receiving information may compromise their investigations from a point of view of rights of defence.

It therefore seems that, despite the extent and variety of co-operation which has been attested in this report, the ability of agencies to work together and exchange information should be substantially improved in order to strengthen their hand faced with cartelists whose ability to exchange information is unhindered.

During phase 2 of the project, some further research was carried out, and some ideas produced for ways in which individual agencies might unilaterally take action to promote or facilitate co-operation involving their jurisdiction. It should be emphasised that these ideas do not have the status of ICN recommendations nor best practices, as not all of the ideas may be legally possible or politically feasible for an agency, given the legal and policy framework in which it operates, and most of the ideas would involve innovative action on the part of the agency which may be considered as controversial in the jurisdiction in question, even if they are legally possible. Furthermore, no proposals are made at this point for multilateral initiatives, either in the ICN or other multilateral organisations.

[52] This agency reports that it co-operated with four other agencies/jurisdictions under the terms of free trade agreements. Logically, they must be agencies which did not respond to the questionnaire, as no other agencies responding to the questionnaire reported this type of co-operation. Or the other agencies involved categorised these examples of co-operation differently.

[53] Such as §50(b) of the German competition law, discussed in section III.3 above.

The ideas focus on the following areas:

- Taking steps to promote multiple immunity/amnesty applications, information from applicants on the other jurisdictions where they have made applications, and the seeking of waivers from applicants permitting agencies to compare the contents of their applications.
- Within the bounds of what is legally possible, exploring what categories and types of evidence might possibly be considered as "non-confidential" for the purposes of co-operation between agencies.
- In cases where information is exchanged between agencies, in application of the OECD Best Practices, a procedure is suggested to check whether the rights of defendants have been respected.
- Agencies could make a clear statement on what kind of information other than evidence they can exchange with other agencies about their investigations (that is, the scope and boundaries of general case discussions with other agencies) without the need for a bilateral agreement. They could also include in such a statement how they would handle material received from other agencies.

ANNEX 1 – QUESTIONNAIRE

I. Introduction

The purpose of this questionnaire is to carry out a stocktaking of the extent and types of co-operation which exist between ICN member jurisdictions in cartel investigations, and what obstacles exist to the further development of such co-operation.

This questionnaire is part of a project being led by DG Competition of the European Commission, within the framework of subgroup 1 (general framework) of the ICN cartels Working Group.

There are a number of questions in the questionnaire, but it is structured in such a way that if a particular type of co-operation is non-existent or underdeveloped, very few questions on that section of the questionnaire need to be answered.

With regard to the detailed questions regarding specific examples of co-operation which have taken place, each agency filling in the questionnaire can decide for itself the level of detail given in the reply, taking into account any issues of confidentiality. Nevertheless, we would ask for as complete an input as possible.

Please refer to the definitions of key terms used, in section II below, before filling in the questionnaire.

II. Definition of terms

Co-operation means co-operation in cartel cases. This questionnaire does not concern general co-operation on matters of policy, capacity-building and so on, only co-operation in the detection, investigation, prosecution and sanctioning of cartels.

Pre-investigation co-operation refers to co-operation up to and including the stage of first collecting evidence of the cartel from the suspected companies. This includes sharing of leads, planning and carrying out co-ordinated surprise searches, raids or inspections or co-operation in other first moves vis-à-vis the suspected companies.

Investigative co-operation refers to co-operation in the main investigative stage of the case, namely from the point when the first investigatory step has been taken vis-à-vis the suspected companies. This involves principally the exchange of confidential information/evidence between agencies but also includes further co-operation on evidence gathering (e.g. arranging for other jurisdictions to interview suspects in the agency's jurisdiction).

Post-investigation co-operation refers to co-operation from the prosecution/sanctioning stage. This may for example include coordination in the filing of charges, co-operation on the trial/prosecution process or the provision of information or evidence by a jurisdiction that has concluded an investigation to a jurisdiction still in the investigative stage.

Confidential information refers to information which is defined as such by the law of the jurisdiction which is answering this questionnaire. For example, information could be defined as confidential if it constitutes business secrets of a company or if its disclosure in normal circumstances could prejudice the commercial interests of a company.

Waivers means permission granted by undertakings under investigation in cartel cases that enable investigating agencies in different jurisdictions to exchange various types of information obtained from the undertaking in question, including confidential information. Such waivers are usually granted in cases of immunity/amnesty applications with several agencies.

Use restrictions refers to information transmitted but restricted, either by the sending authority or by the receiving authority's own national laws, in terms of the use it can make of that information. For example, such

restrictions may stipulate that information may only be used as intelligence, not evidence, may only be used to impose administrative sanctions, or may not be used to prosecute individuals.

III. Types of co-operation

The questions below are asked in relation to each of the following categories of co-operation:

a. Co-operation based on the 1995 OECD Recommendation concerning co-operation between member countries on anticompetitive practices affecting international trade, and, if applicable, any other similar 'soft law' instruments;

b. Co-operation based on a non-competition-specific agreement (e.g. Mutual Legal Assistance Treaty);

c. Co-operation based on competition specific provisions in an agreement covering other subjects too (e.g. Free Trade Agreement);

d. Co-operation based on a competition-specific agreement between jurisdictions (e.g. EU/Canada Agreement Regarding the Application of their Competition Laws, US/Australia Mutual Antitrust Enforcement Assistance Agreement, positive comity agreements, inter-institutional agreements and other similar arrangements);

e. Co-operation based on provisions in national law (including co-operation between EU member States within the European Competition Network under Regulation 1/2003);

f. Co-operation based on waivers;

g. Co-operation based on letters rogatory;

h. Other types of co-operation not covered by the categories listed above (please state the type of co-operation).

IV. Questions

For **each type of co-operation** in the list above, please answer the following questions:

1. Is this type of co-operation available to your jurisdiction/agency?

   YES => please go to Q5.
   NO => please go to Q2.

2. Has your jurisdiction/agency tried to make available this type of co-operation with other jurisdictions/agencies (for example, by trying to conclude agreements of various types with other jurisdictions/agencies)?

   YES => please go to Q3.
   NO => please go to Q4.

3. Why have such attempts not succeeded so far?

   After answering this question, there is no need to answer any further questions regarding this type of co-operation.

4. Why has your agency not attempted to establish this type of co-operation (for example, are other types of co-operation working successfully)?

   After answering this question, there is no need to answer any further questions regarding this type of co-operation.

5. During the last 3 years, are there concrete examples of co-operation between your agency and other agencies using this type of instrument?

   YES => please go to Q7.
   NO => please go to Q6.

6. Please indicate any reasons why there has been no co-operation with other jurisdictions/agencies using this type of instrument, despite its availability.

   After answering this question, there is no need to answer any further questions regarding this type of co-operation.

7. Based on your jurisdiction's/agency's specific experience using this type of co-operation, please provide the following information:

   a) Over the last 3 years, the number of cartel investigations that your agency has been involved in using this type of co-operation;

   b) Over the last 3 years, the number of jurisdictions with whom your agency has had this type of co-operation;

   c) The number of cases where your agency was (i) the primary provider of information/evidence/co-operation, (ii) the primary recipient of information/evidence/co-operation, and (iii) involved in co-operation regarded as reciprocal;

   d) the number of cases where co-operation occurred at the pre-investigation stage. As far as possible, please provide details of the type of pre-investigation co-operation involved (for example, exchange of very general information (not evidence), co-operation in first obtaining evidence, co-ordination of searches, raids or inspections etc.);

   e) The number of cases where co-operation occurred at the investigative stage. As far as possible, please provide details of the type of investigative co-operation involved. For example, please indicate:

      - the type of information exchanged (evidence or other information, and whether it was non-confidential or confidential in nature). In your response please include the definitions which apply in your jurisdiction and explain what those definitions are;
      - how the information was used (for example, against companies or against individuals, for imposing administrative or criminal sanctions, as intelligence but not as evidence);
      - whether the information was used in cases/proceedings other than those for which it was originally collected (if so, please provide details);
      - any further evidence gathering co-operation (e.g. interviews of nationals of other jurisdictions).

   f) The number of cases where co-operation occurred at the post-investigation stage. As above please provide details of the type of post-investigation co-operation (for example, coordination of filing charges, co-operation on the trial/prosecution process, provision of information after the conclusion of the investigation to a jurisdiction still in the process of investigating);

   g) Did any restrictions or difficulties arise during co-operation, and if so, how were they solved? For example, were there certain types of information that your agency would have liked to exchange, but could not, or for some of the information received, did the provider or your own laws restrict their use. Other possible examples include difficulties relating to legal professional privilege, self-incrimination, differences in standards/labelling, blocking statutes, legal challenges etc.;

   h) What is your overall assessment of this type of co-operation? Does it add value compared with other types of co-operation? Does it achieve its goals?

V. Concluding remarks

Please identify any additional issues related to co-operation which should be covered by this questionnaire.

ANNEX 2(a) – SUMMARY OF REPLIES TO THE COMMISSION'S QUESTIONNAIRE ON INTERNATIONAL CO-OPERATION

Agency/ Jurisdiction	Informal co-operation	Co-operation based on competition specific provisions in agreement covering other subjects too (FTAs)	Co-operation based on competition-specific agreement between jurisdictions	Co-operation within the european competition network	Co-operation based on letters rogatory	Co-operation based on MLATs	Co-operation based on waivers
Australia ACCC	×	✓	✓	/	×	✓	✓
Belgium	×	/	/	✓	/	/	/
Brazil CADE	✓	×	✓	/	×	✓	×
Canada CB	✓	×	✓	/	×	✓	✓
EC DG Competition	✓	×	✓	✓	/	/	✓
France DGCCRF	×	/	×	✓	/	/	×
Germany BKA	×	/	✓	✓	×	/	✓
Hungary GVH	×	/	/	✓	✓	/	✓
Israel AA	×	×	×	/	/	✓	/
Jamaica JFTC	×	×	/	/	×	/	/
Japan JFTC	×	×	✓	/	×	/	×
Mexico FCC	×	×	✓	/	/	/	/
New Zealand CC	✓	/	/	/	/	/	/
Netherlands NMA	×	/	/	✓	/	/	/
Portugal AC	×	/	×	✓	/	/	/
Romania CC	×	×	×	/	/	/	×
Serbia	×	/	/	/	/	/	/
South Africa SACC	✓	×	/	/	/	/	×
Switzerland WEKO	×	×	/	/	/	×	×
USA DoJ	✓	×	✓	/	×	✓	✓

✓ = 1 or more examples of this type of co-operation reported over the last three years involving this agency.
× = this kind of co-operation is available to this agency, however the agency reported no examples of this type of co-operation over the last three years.
/ = this kind of co-operation is not available to this agency.

Note 1: only 1 agency (that of Romania) reported examples of 'co-operation based on provisions in national law' independently of any other co-operation instrument.
Note 2: 1 agency reported having used another type of co-operation not listed in this table, the Canadian CB which reported having used diplomatic channels in one case.

ANNEX 2(b) – STATISTICAL BREAKDOWN OF TYPES OF CO-OPERATION REPORTED

	N° of agencies in the questionnaire to which this type of co-operation is available	N° of agencies reporting instances of this type of co-operation	N° of cases, in which this type of co-operation took place over the last 3 years	N° of other agencies with which this type of co-operation took place over the last 3 years	Stage of the investigation (pre-investigatory, investigatory, post-investigatory)
Informal co-operation (based inter alia on the 1995 OECD recommendation)	All 20 in principle	6	1,3,4,4,9 (1 other agency did not provide this information)	1,1,2,4,5 (1 other agency did not provide this information)	All 3 phases
Co-operation based on competition-specific provisions in agreement covering other subjects too (FTAs)	12	1	12	4	Information not provided
Co-operation based on competition-specific agreement between jurisdictions	13	8	Ranging from 1 to 20	Ranging from 1 to 8	All 3 phases
Co-operation within the European competition network	7	7	1,1,3,7,8, 'about a dozen', 'a large number every year'		All 3 phases
Co-operation based on waivers	12	6	10, 7, 16 (3 agencies did not provide this information)	4,4,8 (3 agencies did not provide this information)	All 3 phases
Co-operation based on MLATs	6	5	1,1,3,5 (1 other agency did not provide this information)	1,1,1 (2 agencies did not provide this information)	Only 2 agencies provided this information: – 1 agency reported pre-investigatory phase only; – 1 agency reported pre-investigatory and investigatory phases.
Co-operation based on letters rogatory	8	2	Only 1 of the 2 agencies provided this information: 5 cases	Only 1 of the 2 agencies provided this information: 5 other jurisdictions	Only 1 of the 2 agencies replied: 'general information only, not evidence'

Note 1: The competition agencies of Australia, Belgium, Brazil, Canada, the European Union, France, Germany, Hungary, Israel, Jamaica, Japan, Mexico, the Netherlands, New Zealand, Portugal, Romania, Serbia, South Africa, Switzerland and the United States (DoJ) answered this questionnaire.

Note 2: Only one agency (that of Romania) reported examples of co-operation based on national law independently of any other instrument of co-operation.

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ANNEX 4 – QUESTIONNAIRE FOR NGAS ON CO-OPERATION/LENIENCY

(used in phase 2 of the project)

Introductory Note

The purpose of this questionnaire is to follow up on a report submitted to the ICN 2006 annual conference on co-operation between competition agencies in cartel investigations. The report itself is available here:

http://www.internationalcompetitionnetwork.org/capetown2006/CompetitionAgenciesInCartelInvestigations.pdf

The conclusions of that report set out several areas for further study, including:

- Should the ICN examine whether divergences among leniency programmes hinder co-operation and co-ordination between agencies, and if the answer is yes, should it work to promote convergence in such areas?

Some of the questions are factual, and others ask for your appreciation. We would be grateful if you could find the time to answer the questions by 15 December 2006.

1. Have you had experience of instances in which a client of yours participating in a cartel was envisaging submitting amnesty/immunity applications in more than one jurisdiction? (If not, there is no need to answer any further questions).

2. If yes, did the client in question always submit all of the envisaged multiple immunity/amnesty applications? (If the answer is yes, go straight to Q5.)

3. In cases where the client in question did not in the end submit all of the envisaged multiple leniency applications, what did it do?

   * submit no applications at all?

   * submit applications in only one (or several) of the jurisdictions in question but not in others?

If possible, please provide numbers (approximate if necessary) about the number of cases referred to in the answers above.

4. In cases where the client did not in the end apply for immunity/amnesty in all the jurisdictions where it was considering doing so, what were the reasons for this decision?

5. Regarding timing of multiple immunity/amnesty applications, in your experience was submission always simultaneous? If not, please explain why not.

6. In cases where a client of yours did apply for immunity/amnesty in more than one jurisdiction, did it always

   a) inform all of the agencies of the other jurisdictions in which an application had been submitted?

   b) grant a waiver to allow the agencies in question to share information contained in the applications?

7. In cases where no waiver was granted, what were the reasons for this decision? For example:

   - Did the presence or absence of a marker system in the different leniency programmes have any influence on the decision whether or not to apply? If so, please explain.

- Did the presence or absence of an ongoing co-operation requirement in the different leniency programmes have any influence on the decision whether or not to apply? If so, please explain.

- Did any other features of the different leniency programmes have any influence on the decision whether or not to apply? If so, please explain.

8. Please make any further comments which you wish to make regarding the management of multiple amnesty/immunity applications across jurisdictions.

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